90-1800

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OF COUNSEL:

MICHAEL D. POLANSKY
General Counsel
GRUMMAN AEROSPACE CORPORATION
Bethpage, New York 11714

GENE PERRY BOND
(Counsel of record)
ROBERT L. DEITZ
LYNDA TROUTMAN O'SULLIVAN
MARTIN P. WILLARD
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005
202/628-6600

Attorneys for Petitioner,
Grumman Aerospace Corporation

May 24, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

80

QUESTIONS PRESENTED

1. Whether the court of appeals erred in construing an agency regulation (48 C.F.R. § 33.207(c)(2)) so that it is inconsistent with the Contract Disputes Act and usurps a corporation's prerogative to designate who may speak for it.

2. Whether the court of appeals erred in deferring to the agency's interpretation of the statutory certification requirement because the agency lacked statutory authority to promulgate any regulation regarding certification of claims.

3. Whether the court of appeals erred in holding that certification of a claim is a prerequisite to the exercise of subject matter jurisdiction.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. Statutory History	4
B. Factual Background and Proceedings Below	5
REASONS FOR GRANTING THE WRIT	9
I. The Court's Restrictive Interpretation of 48 C.F.R. § 33.207(c)(2) Is Inconsistent with the Text of the Regulation and Conflicts with the Statute on Which it is Based	13
II. The Certification Regulation Is Not Entitled to Deference Because It Was Promulgated Without Statutory Authority and Is an Unreasonable Interpretation of the Contract Disputes Act	19
III. Claim Certification Is Not a Prerequisite for Subject Matter Jurisdiction	22
CONCLUSION	28

TABLE OF AUTHORITIES

CASES:	Page
Al Johnson Constr. Co. v. United States, 19 Cl. Ct. 732 (1990)	14
Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426 (Fed. Cir. 1989)	18
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	27
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	13
Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986)	22
Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89 (1983)	22
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	15,19-20,22
Crandon v. United States, 110 S. Ct. 997 (1990)	20
Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64 (1935)	23
Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983)	11
Freeport-McMoRan Inc. v. K N Energy, Inc., 111 S. Ct. 858 (1991)	25
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)	21
Granberry v. Greer, 481 U.S. 129 (1987)	26
Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961)	25
Ingalls Shipbuilding, Inc., ASBCA No. 38323 (March 21, 1991) (WESTLAW, FGC-BCA library)	10,11
Little River Lumber Co. v. United States, 21 Cl. Ct. 527 (1990)	15

Table of Authorities Continued

	Page
Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884)	26
Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824)	25
Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989)	25,26
Newport News Shipbuilding and Drydock Co., ASBCA No. 33244 (March 4, 1991) (WESTLAW, FGC-BCA library)	10
NLRB v. Brown, 380 U.S. 278 (1965)	22
Owen Equip. and Erection Co. v. Kroger, 437 U.S. 365 (1978)	24
Paul E. Lehman, Inc. v. United States, 673 F.2d 352 (Ct. Cl. 1982)	23
PCL Civil Constrs., Inc., ASBCA No. 41881 (March 27, 1991) (WESTLAW, FGC-BCA library)	10
Rock Island, Ark. & La. R.R. v. United States, 254 U.S. 141 (1920)	9
Skelly & Loy v. United States, 685 F.2d 414 (Ct. Cl. 1982)	23
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	22
Snyder v. Harris, 394 U.S. 332 (1969)	24
St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)	25
Triax Co. v. United States, 20 Cl. Ct. 507 (1990)	10
United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987)	10
United States v. Larionoff, 431 U.S. 864 (1977)	18
Wainright v. Sykes, 433 U.S. 72 (1977)	26
W.H. Moseley Co. v. United States, 677 F.2d 850 (Ct. Cl.), *cert. denied*, 459 U.S. 836 (1982)	23

Table of Authorities Continued

	Page
William L. Crow Constr. Co., ASBCA Nos. 40998 and 41508 (March 27, 1991) (WESTLAW, FGC-BCA library)	10,14
W.M. Schlosser Co. v. United States, 705 F.2d 1336 (Fed. Cir. 1983)	23
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)	23,24-25
STATUTES:	
Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	24-25
42 U.S.C. § 2000e-5(e)	25
Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613	
41 U.S.C. § 601(4)	15
41 U.S.C. § 605(c)(1)	*passim*
41 U.S.C. § 607(d)	6,24
41 U.S.C. § 607(h)	20
Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611 (1978)	17
10 U.S.C. § 2410	18
Tucker Act, 28 U.S.C. § 1491	21
10 U.S.C. § 2405	11
28 U.S.C. § 1295(a)(3), (10)	12
REGULATIONS:	
Federal Acquisition Regulation 33.207(c)(2), 48 C.F.R. § 33.207(c)(2)	3,13
48 C.F.R. § 33.207(c)(2)(i)	3,7,13
48 C.F.R. § 33.207(c)(2)(ii)	3,13

Table of Authorities Continued

Page

OTHER AUTHORITIES:

124 Cong. Rec. S18635-41 (daily ed. October 12, 1978) (statement of Sen. Byrd) 16,21

Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787, and S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) 17

55 Fed. Contracts Rep. (BNA) 369 (March 25, 1991) 11

Fed. R. Civ. P. 11 24

H.R. 10929, 95th Cong., 2d Sess., § 808 (1978) ... 17

H.R. Rep. No. 1402, 95th Cong., 2d Sess. (1978) . 18

S. 3178, 95th Cong., 2d Sess. (1978) 16,21

S. Rep. No. 1118, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235 4-5,12,20,24

14 Weekly Comp. Pres. Doc. 1922 (Nov. 6, 1978) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-_____

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Grumman Aerospace Corporation respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the opinion and judgment of that court in *United States v. Grumman Aerospace Corporation.*

OPINIONS BELOW

The opinion of the court of appeals is reported at 927 F.2d 575 and is set forth in Appendix A. The opinion of the Armed Services Board of Contract Appeals is reported at 90-1 BCA (CCH) ¶ 22,417 (1989) and is set forth in Appendix B.

The original judgment of the court of appeals was entered on October 1, 1990, in a nonprecedential opinion reported at 918 F.2d 185 (table), and is set forth in Appendix C. Grumman Aerospace filed a timely petition for rehearing and suggestion for rehearing *en banc*. On January 11, 1991, the court initially denied the petition for rehearing, but on January 25, the court withdrew its denial of the petition and recalled the mandate. These orders are attached as Appendix D. On January 30, the court issued an opinion that was recalled later the same day and declared by a notice dated February 20, 1991, to be "of no effect." The notice is reproduced in Appendix E. On February 27, the court issued its published opinion granting the petition for rehearing, but adhering to the result set forth in its October 1, 1990, opinion.

JURISDICTION

This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This case concerns the meaning and effect of the claim certification requirement contained in the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1), which states in its entirety:

> A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate

> and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

Federal Acquisition Regulation (FAR) 33.207(c)(2), 48 C.F.R., purports to implement the statutory requirement. It provides:

> If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

STATEMENT OF THE CASE

This case presents important questions arising under the Contract Disputes Act of 1978—the statute that governs the adjudication of virtually all contract disputes between the federal government and the many thousands of individuals, partnerships and corporations that supply goods and services to the Government. Specifically at issue are (i) the meaning and effect of the requirement imposed by Congress in 41 U.S.C. § 605(c)(1) that the "contractor" certify contract claims exceeding $50,000 and (ii) the force and effect of FAR 33.207(c)(2), promulgated by the Office of Federal Procurement Policy (OFPP), which purports to define, and therefore limit, the persons who may certify contract claims on behalf of a "contractor" that is not an individual. The court below held that the FAR certification regulation not only has the

force and effect of law, but also defines the subject matter jurisdiction of the courts and agency boards of contract appeals.

A. Statutory History

In recognition of the "far-reaching impact [of Government procurement] on the economy of our society and on the success of many major Government programs," Congress enacted the Contract Disputes Act of 1978 (CDA) in order to provide "a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 1, 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235, 5238. This theme was echoed by President Carter on signing the Act into law:

> [The CDA] provides for the first time a uniform statutory base for the resolution of claims and disputes arising in connection with Federal contracts. The previous process was a mass of confusing and sometimes conflicting agency regulations, judicial decisions, decisions of agency boards of contract appeals, and statutes. This act will provide a much more logical and flexible means of resolving contract disputes. It should lead to savings for Federal agencies and contractors.

Statement by President Carter upon signing the CDA into law on November 1, 1978, 14 Weekly Comp. Pres. Doc. 1922 (Nov. 6, 1978).

Enactment of the CDA marked the culmination of an effort begun nearly a decade earlier when Congress created the Commission on Government Procurement. *See* S. Rep. No. 1118 at 4. "Until that time

there had been no comprehensive examination devoted exclusively to the system by which claims by and against the Government with regards to Government contracts should be adjudicated." *Id.* Prior to the CDA, Congress had "never passed into law its definition of how the process should work." *Id.*

The CDA was designed to cure the problems previously caused by agency manipulation of contractors' access to courts and boards of contract appeals. Prior to the CDA, the forums for resolving contract disputes existed by "executive branch fiat—that is, by the insertion of contract terms specifying how disputes in specific areas will be resolved—and by agency regulations governing the procedural and substantive adjudication of disputes." *Id.* at 2. The CDA was enacted because Congress perceived the need to eliminate the agencies' ability to define the jurisdiction of contract claims forums in order to provide a fair, balanced, and efficient system for resolution of contract disputes. *Id.* at 2-4. Congress believed it was necessary to improve the system because "[t]he way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business." *Id.* at 4.

B. Factual Background and Proceedings Below

Petitioner Grumman Aerospace Corporation manufactures carrier-based aircraft for the U.S. Navy. The bulk of its revenues derive from contracts with the Government.[1] The claim at issue in this case had

[1] Grumman Aerospace Corporation is a wholly owned subsidiary of Grumman Corporation, a publicly held corporation whose principal place of business is New York.

its genesis in a decision by the Defense Contract Audit Agency to disallow employee compensation costs incurred on forty-three cost reimbursement contracts between Grumman Aerospace and the Government. The costs that were disallowed were dividends paid to employees on restricted stock awards.[2] The dispute implicated employee compensation costs amounting to several hundred thousand dollars per year.

On January 7, 1987, after unsuccessful attempts at informal resolution of the dispute, Grumman Aerospace filed a claim with the contracting officer for reimbursement of the disallowed costs. The claim was certified by Carl A. Paladino, Senior Vice President-Finance of the Aircraft Systems Division of Grumman Corporation and Treasurer of Grumman Aerospace Corporation.

The claim was denied, and Grumman Aerospace appealed to the Armed Services Board of Contract Appeals, invoking its jurisdiction under 41 U.S.C. § 607(d). After a hearing on the merits, the Board sustained the appeal and held that the company was entitled to recover all of the challenged costs.

The Board also reviewed and accepted the sufficiency of Mr. Paladino's certification:

> The Government moves to dismiss the appeal because of a faulty certification based upon its view that Mr. Paladino was not the proper official within the corporation to sign

---

[2] In 1978, Grumman Corporation, Grumman Aerospace's parent, adopted a Restricted Stock Award Plan. The purpose of the plan was to provide incentive compensation to employees. The opinion of the Armed Services Board of Contract Appeals describes the plan in more detail. App. B, 21a-23a.

> the certification. As Senior Vice President and Treasurer, Mr. Paladino was a proper official within the organization to make the certification and we therefore deny the motion to dismiss.

App. B, 33a (citations omitted).

On appeal, the United States Court of Appeals for the Federal Circuit vacated the decision of the Board. In its initial, nonprecedential opinion dated October 1, 1990, the panel (Judges Markey and Michel and Senior Judge Miller) ruled that—based on its interpretation of the certification regulation—there was not "substantial evidence" to support the Board's holding that Mr. Paladino was qualified to certify Grumman Aerospace's claim. App. C, 41a. The panel held that failure to satisfy the certification regulation deprived the Board of jurisdiction to decide the appeal. App. C, 40a.

In its second, precedential opinion, the same panel granted Grumman Aerospace's petition for rehearing "to the extent of considering and disposing of" the arguments therein, but adhered to the original result and vacated the decision of the Board for lack of jurisdiction. App. A, 2a.

As an initial matter, the panel held that Mr. Paladino was not a "senior company official in charge at the contractor's plant or location involved" pursuant to 48 C.F.R. § 33.207(c)(2)(i). The panel interpreted this prong of the regulation to require that the official must "have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." App. A, 9a (emphasis in original). The panel also held that

Mr. Paladino lacked "overall responsibility for the conduct of the contractor's affairs" because "an individual having overall responsibility for just the contractor's financial affairs would not fit the description" in the regulation. App. A, 10a.

Second, the panel rejected Grumman Aerospace's claim that the regulation is unlawful because it conflicts with the CDA certification provision, 41 U.S.C. § 605(c)(1). The panel acknowledged that the Act requires only that "the contractor" certify the claim, but rejected the proposition that anyone who can bind the contractor under traditional principles of agency is authorized under the statute to certify claims. Instead, the panel held that the statute leaves a "gap" that the regulation permissibly fills. App. A, 5a.

Finally, the panel declined to examine the soundness of prior decisions holding that the certification requirement is a jurisdictional prerequisite that must be satisfied before boards or courts may act on a contractor's appeal. App. A, 7a-8a.

Judge Plager, joined by Judges Newman, Lourie, and Rader, filed a dissent from the court's refusal to rehear the case *en banc*. The dissent disagreed with each of the panel's holdings.

First, the dissent concluded that, if the regulation were consistent with the statute, Mr. Paladino would meet the regulation's description of an officer having overall responsibility for the conduct of the contractor's affairs. App. A, 16a. The dissent noted that the subject matter of the claim—whether dividend payments on restricted stock awarded to employees is a reimbursable contract cost—was an issue upon which the certifying official, the Senior Vice President-Fi-

nance and Treasurer, would be "among the most knowledgeable and responsible" corporate officials. App. A, 15a.

Second, the statute on which the regulation is based, 41 U.S.C. § 605(c)(1), requires the "contractor" to certify the claim. As the dissent observed, "the statute delegates *to the contractor* the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures." App. A, 15a (emphasis in original). The regulation as construed by the panel is not consistent with the statute and therefore is invalid. App. A, 15a.

Finally, the dissent contended that the failure properly to certify a claim under the CDA does not deprive a board or court of subject matter jurisdiction. Rather, improper certification means only that the particular claimant has failed to state a claim for which relief may be granted. To confuse subject matter jurisdiction with entitlement to relief creates "not only analytical difficulties, but practical ones as well." App. A, 17a.

REASONS FOR GRANTING THE WRIT

As a government contractor—specifically, as a defense manufacturer whose principal customer is the U.S. Government—Grumman Aerospace is mindful of Justice Holmes's admonition that "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). Grumman Aerospace is accustomed to turning square corners, for—as with all defense contractors—every aspect of its business dealings with the Government is controlled by stat-

utes and regulations. *See United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1503-04 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987).

With respect to its certification of contract claims, Grumman Aerospace followed the law as it existed in decisions of the agency boards and the United States Claims Court at the time of the claim submission in 1987. Prior to the decision in this case, no court had ever held that a knowledgeable and responsible corporate officer could not validly certify a government contract claim on behalf of a corporation. *Triax Co. v. United States*, 20 Cl. Ct. 507, 511 (1990). Indeed, the decision below is not only unprecedented, it is also inconsistent with the language of the regulation and conflicts with the statute which the regulation purports to implement, 41 U.S.C. § 605(c)(1).

What makes the decision especially pernicious is that the court reaffirmed prior decisions holding the certification requirement to be jurisdictional. As a consequence, numerous cases pending before agency boards of contract appeals and the Claims Court are now nullities.[3] Contractors that filed these claims in

---

[3] As a direct result of the lower court's decision, the Armed Services Board of Contract Appeals dismissed the following cases for improper certification in the month of March 1991 alone: *Newport News Shipbuilding and Drydock Co.*, ASBCA No. 33244 (March 4, 1991) (WESTLAW, FGC-BCA library); *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323 (March 21, 1991) (WESTLAW, FGC-BCA library); *William L. Crow Constr. Co.*, ASBCA Nos. 40998 and 41508 (March 27, 1991) (WESTLAW, FGC-BCA library); *PCL Civil Constrs., Inc.*, ASBCA No. 41881 (March 27, 1991) (WESTLAW, FGC-BCA library). In the *Newport News* case, the original claim for over $8 million was filed on January 21, 1986, and the dismissal

reliance upon existing case law must begin the claims process anew by submission of a certified claim to the contracting officer, wasting, for no good purpose, the resources of litigants and the judiciary alike. In addition, contractors will lose the statutory interest to which they are entitled.[4] What is worse, if the certification requirement is jurisdictional, then submission of an improperly certified claim will not toll the statute of limitations, and many claims will be lost forever. *See, e.g.*, 10 U.S.C. § 2405 (limitations on adjustment of shipbuilding contracts).

The decision below thus condones and resurrects the very wrong that Congress legislated against when it passed the CDA—manipulation of the jurisdiction of contract dispute forums by the agencies opposing contractor claims. The panel's decision, moreover, creates additional certification requirements out of whole cloth—such as that the certifying official must "have both primary responsibility for the execution of the contract *and* a physical presence at the location of

---

on March 4, 1991, more than five years later, came only after a full hearing and post-trial briefing on the merits of the case. In *Ingalls*, the contractor's claim in excess of $3 million was submitted in July of 1987 and dismissed in March of 1991, thus nullifying nearly four years' worth of proceedings. Furthermore, the Board has begun a review of certifications in all pending cases to determine how many other cases must be dismissed following the decision below. *See* 55 Fed. Contracts Rep. (BNA) 369 (March 25, 1991). Thus the pace of dismissals may be expected to accelerate.

[4] *See, e.g., Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). As the dissent below noted, the panel's decision gives the Government "more years to avoid paying its just debts," and denies to contractors "the interest on the money due that the statute requires be paid." App. A, 16a.

the primary contract activity"—thus encouraging the agencies to do likewise. App. A, 9a. Indeed, the panel's decision invites a never-ending stream of elaborations on who may certify, so that contractors will never be certain that they will have access to a forum able to adjudicate their claims. The decision below has made a travesty of the remedial purpose of the CDA—to provide a "fair, balanced, and comprehensive statutory system" for resolving contract disputes. S. Rep. No. 95-1118 at 1.

Over the past decade, the contract dispute resolution process has been burdened with an ever-proliferating "law of claim certification." With each decision on the meaning of the certification regulation, the law has become less clear and less certain. Because the ground rules are constantly changing, the contracting community can no longer rely on precedent. The regulation at issue here was entirely unnecessary; the law of agency could have been applied to decide whether the "contractor" had indeed certified the claim. Even if administrative agencies can be expected to issue many regulations that are not necessary, a court should not—without clear direction from Congress—burden the disputes process by elevating an unnecessary regulation to jurisdictional status.

This case is significant not only to Grumman but to all companies that contract with the Government. It is also ripe for review. There can never be a conflict among the circuits on this issue, for the Federal Circuit has exclusive jurisdiction of appeals from decisions of the Claims Court and the agency boards of contract appeals. 28 U.S.C. § 1295(a)(3), (10). But the strong dissent filed in this case by four members of

the Federal Circuit underscores the seriousness and significance of the decision filed below.

I. The Court's Restrictive Interpretation of 48 C.F.R. § 33.207(c)(2) Is Inconsistent with the Text of the Regulation and Conflicts with the Statute on Which It Is Based.

The starting point in every case involving construction of a text is the language of the text itself. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

48 C.F.R. § 33.207(c)(2) provides that individuals who may certify claims on behalf of a corporation may be drawn from either of two categories:

> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

Certainly there is ambiguity in both categories. By focusing, as the panel below did, on the phrase "official in charge" in subsection (i), or on the phrase "having overall responsibility" in subsection (ii), one might conclude that the most senior person at the plant (subsection (i)) or the most senior overall corporate official (subsection (ii)) must certify a claim. Under this interpretation anyone who reports to anyone else cannot be "in charge," and in most cases only one person will have "overall responsibility" for *all* of a corporation's affairs. Thus, although the court below adamantly denied it, App. A, 10a, it is hard to dispute that, under the panel's ruling, only *the* plant manager or *the* chief executive officer of a cor-

poration can certify claims under the two subsections of the regulation.[5]

The most immediate objection to this interpretation is that, had the regulators intended it, they would have said so in plain English: "All claims by a corporation shall be certified by either the plant manager or the CEO." They did not.

Moreover, upon the face of the regulation the panel's interpretation is grammatically impossible. Both subsections begin arrestingly with indefinite articles, "a" and "an." These articles are called "indefinite" precisely because they do not identify a specific individual, but rather identify qualities that an individual must have. Accordingly, these articles demand an interpretation that allows a number of individuals to certify under each subsection. And such

---

[5] The panel's opinion, however, may not be susceptible of such a clear meaning. The panel's pronouncement that a "senior company official" in charge at the plant or location involved must have a "physical presence at the location of the primary contract activity," App. A, 9a, has been interpreted by the Armed Services Board of Contract Appeals to mean that the official must spend a majority of his or her time at the site. *See William Crow Constr. Co.*, ASBCA Nos. 40998 and 41508 (March 27, 1991) (WESTLAW, FGC-BCA library) (inconsistency between assertions that Vice President spent "much" of his time at site and "the majority" of his time at the site required dismissal). On the other hand, the Claims Court and the Board have also interpreted this prong of the regulation to require that the certifying official be a senior official of the company and not just the most senior official on site. *Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 736 (1990); *PCL Civil Constrs., Inc.*, ASBCA No. 41881 (March 27, 1991) (WESTLAW, FGC-BCA library). So a plant manager may not be a "senior company official," and there may be no "senior company official" who spends all or a majority of his time at the site. This is the end to which hypertechnical interpretations lead us.

an interpretation is perfectly consistent with the language of the entire regulation.

In common parlance numerous people have "overall responsibility" for the conduct of a corporation's affairs. In this case, Mr. Paladino had "overall responsibility" for financial matters, including the cost allowability of dividends on restricted stock. This interpretation is required by—and the panel's interpretation is inconsistent with—the statute upon which the regulation is based.

Regulations must be construed consistently with the statutes they purport to implement. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The CDA, 41 U.S.C. § 605(c)(1), provides in relevant part:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

The statute requires the "contractor"[6] to certify the claim. An individual properly appointed by a corporation as an officer or agent has the authority to bind the corporation within the scope of his or her authority. *See, e.g., Little River Lumber Co. v. United States*, 21 Cl. Ct. 527, 533 (1990) (holding a corpo-

---

[6] "Contractor," in turn, is defined in the Contract Disputes Act as a party to a government contract other than the Government. 41 U.S.C. § 601(4).

ration's outside attorney qualified to certify a contract claim, under the statutory provision as opposed to the regulation). Thus, the dissent correctly asserts that "[t]he statute delegates *to the contractor* the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures."[7] App. A, 15a (emphasis in original).

The legislative history of the purpose of the certification requirement, though scant, supports this interpretation. The requirement was added by Senator Byrd to S. 3178, the Senate version of the CDA, on the day it passed the Senate. 124 Cong. Rec. S18640 (daily ed. October 12, 1978). The requirement is not addressed in any committee report or in the explanation accompanying the floor amendment.

The origins of certification appear to lie in testimony offered before the Senate by Admiral Rickover. He recommended that all claims submitted to the government, not just those over $50,000, be certified by the contractor. Rickover stated:

> The following provisions should be added to speed up the contract disputes process . . . .
>
> One: Require as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate

---

[7] The dissent asks rhetorically whether a corporate vice president in charge of government contract certifications would fail the panel's test, implying that he would. App. A, 15a. By contrast, under principles of agency, a corporation could authorize such an official to bind it. Certification by such an official would meet the statutory certification requirement, but not the regulatory one as interpreted by the panel below.

> signed by *a senior responsible contractor official*, which states that the claim and its supporting data are current, complete and accurate.

Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787, and S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1978) (emphasis added). In written submissions, this recommendation was variously phrased by Rickover as "the contractor shall certify that the claim and supporting data are current, complete and accurate . . . ," *id.* at 13, and as "the contractor must submit a signed certificate from a senior contractor official . . . . " *Id.* at 33.

Congress ultimately adopted a certification requirement, which appears in 41 U.S.C. § 605(c)(1), but it did not use Admiral Rickover's language specifying who may certify. Indeed, strong evidence exists that Congress positively rejected a certification requirement of the sort recommended by him and imposed by the court below. In the Department of Defense Appropriation Authorization Act of 1979—passed contemporaneously with the Contract Disputes Act—Congress did adopt Admiral Rickover's suggestion. Pub. L. No. 95-485, § 813, 92 Stat. 1611, 1624 (1978). The House bill passed in May 1978, H.R. 10929, provided for certification of defense contract claims exceeding $100,000 by "*the* senior company official in charge at the plant or location involved." H.R. 10929, 95th Cong., 2d Sess. § 808 (1978) (emphasis added). When the House and Senate conferees met, this certification

language was significantly modified, requiring certification by "a" rather than "the" senior company official. H.R. Rep. No. 1402, 95th Cong., 2d Sess. (1978), at 55. This requirement was signed into law on October 20, 1978, and is currently codified at 10 U.S.C. § 2410.

The conclusion to be drawn from the parallel legislative history of the two statutes is that, in the CDA, Congress considered but declined to adopt Admiral Rickover's suggestion that the appropriate certifying official be specified.

The legislative evidence suggests that the certification requirement of 41 U.S.C. § 605(c)(1) was designed to trigger a contractor's potential liability and thus deter the submission of unwarranted claims. *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1429 (Fed. Cir. 1989). Requiring the "contractor" to certify a claim fulfills completely this purpose. Any corporate officer or employee who, under traditional agency principles, can bind a corporation would satisfy this requirement. The dissent below is surely correct in suggesting that if the Government seriously questions the authority of an employee to bind the corporation, it need only demand proof of that authority. App. A, 16a.

If the panel's interpretation of the regulation is correct, then the regulation takes from the contractor what the statute grants—the prerogative to designate who speaks for it. As interpreted by the panel, the regulation flatly contradicts the statute and is, therefore, invalid. *United States v. Larionoff*, 431 U.S. 864, 873 (1977). As stated succinctly by the dissent:

"[e]ither the panel or the regulation is wrong." App. A, 16a.

In this case, Mr. Paladino's authority to bind Grumman Aerospace Corporation is not in dispute. As the dissent observed, Mr. Paladino is precisely the sort of person who ought to certify the claim at issue in this case:

> The subject matter of the claim is whether certain dividend payments on stock awarded to the contractor's employees are includable elements in cost reimbursable contracts. The officer certifying the claim was the corporation's Senior Vice President and Treasurer. Obviously, such an official would be among the most knowledgeable and responsible in assessing such a claim.

App. A, 15a. This Court should grant the petition and reverse the judgment of the court of appeals.

II. The Certification Regulation Is Not Entitled to Deference Because It Was Promulgated Without Statutory Authority and Is an Unreasonable Interpretation of the Contract Disputes Act.

The panel erroneously deferred to OFPP's interpretation of the statutory certification requirement, purportedly based on the authority of this Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). App. A, 5a. The panel, however, ignored a fundamental prerequisite to application of the *Chevron* analysis—namely, that the agency interpretation in question must have been issued pursuant to a congressional delegation of authority which is at least implicit, if not explicit. Where an agency is not charged

with administering a statute, there is no implicit authority under *Chevron*. *See Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring):

> The law in question . . . is not administered by any agency. . . . [I]n a general way all agencies of the Government must interpret it . . . in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*.

Because Congress never gave OFPP or any other agency responsibility for administering the CDA, no agency regulation interpreting the CDA certification requirement is entitled to deference under *Chevron*.

The CDA strictly limited OFPP's role to that of issuing "guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards." 41 U.S.C. § 607(h). The Senate Report elaborated on OFPP's limited role as follows:

> The authority of the [OFPP] Administrator in the establishment of agency boards is limited to developing the workload study formats; being the central clearing point for collection of each of the agency's workload studies; and acting in concert with the agency head in the establishment of each board. The Administrator shall not set up rules and regulations that would give him the power to unilaterally set up or terminate a board.

S. Rep. No. 95-1118 at 27.

OFPP's limited authority was further circumscribed by floor amendment just prior to passage of the CDA. As originally reported out of committee, and until

amended on the Senate floor just prior to passage, S. 3178 empowered OFPP to "issue *rules and regulations* with respect to—the establishment, functions, and procedures of the agency boards . . . . " 124 Cong. Rec. S18636 (daily ed. October 12, 1978) (emphasis added). The floor amendment deleted the words "rules and regulations with respect to" and inserted the words "*guidelines* with respect to criteria for." *Id.* at S18640 (emphasis added). Thus, Congress expressly withdrew from OFPP, prior to passage of the CDA, any authority to issue binding rules and regulations even with respect to agency board procedures or functions. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (guidelines treated as interpretative rules).

Congress, furthermore, never authorized OFPP to play any role with respect to the establishment, functions, or procedures of the United States Claims Court. Thus, there is not even a colorable basis for deferring to OFPP's interpretation insofar as the jurisdiction of that court is concerned.[8] If one accepts the premise of the panel below, that OFPP is authorized by the CDA to circumscribe the jurisdiction of the agency boards, one is left with an anomaly clearly contrary to congressional intent—that compliance with the certification regulation is necessary to invoke the jurisdiction of an agency board, but not the jurisdiction of the United States Claims Court.

Even if OFPP had been authorized by the CDA to issue an interpretation of the certification require-

---

[8] The statutory grant of jurisdiction to the Claims Court to hear and decide claims against the government is contained in the Tucker Act, 28 U.S.C. § 1491.

ment, the regulation as construed by the panel below would still be invalid, for it is entirely unreasonable and in direct conflict with the statute. *See Chevron*, 467 U.S. at 844 (unreasonable agency interpretation not entitled to deference). The deference accorded to administrative interpretations pursuant to the doctrine of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), is tempered, as this Court has said, by the realization that courts may not "rubber-stamp" rulings that are " 'inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)). Both the courts and the agencies " 'must give effect to the unambiguously expressed intent of Congress,' " and the traditional deference accorded agency interpretations cannot be applied to alter that intent. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron*, 467 U.S. at 843).

In this case, the intent of Congress to delegate "*to the contractor* the power to designate who speaks for it," App. A, 15a, is clear. It is also clear that Congress did not intend for OFPP to issue regulations affecting the exercise of subject matter jurisdiction by contract claims forums, and in fact intended to end agency manipulation of such jurisdiction. Therefore, OFPP's claim certification regulation cannot be upheld.

III. Claim Certification Is Not a Prerequisite for Subject Matter Jurisdiction.

As noted earlier, what renders the decision below particularly harmful is the court's holding that a de-

fect in certification is jurisdictional. Over strong dissent, the court below declined to reexamine this issue, deciding instead to rely on "the extensive case law holding otherwise." App. A, 7a.

The provenance of this doctrine appears to be *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct. Cl. 1982). The *Lehman* court analyzed the certification requirement by quoting extensively from the testimony of Admiral Rickover, discussed above in Section I. From this testimony, the court concluded that "[u]nless that requirement is met, there is simply no claim that this court may review under the Act." *Id.* at 355. Subsequent decisions made the further inference based on *Lehman* that certification is a jurisdictional prerequisite to consideration of a contract claim. *E.g., W.H. Moseley Co. v. United States*, 677 F.2d 850, 852 (Ct. Cl.), *cert. denied*, 459 U.S. 836 (1982); *Skelly & Loy v. United States*, 685 F.2d 414, 416 (Ct. Cl. 1982); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1337-39 (Fed. Cir. 1983).

This conclusion is a *non sequitur*. From the proposition that a statute contains a requirement, it does not follow that the requirement is jurisdictional. In fact, there are sound reasons to conclude that the certification requirement is not jurisdictional.

As an initial matter, the certification requirement does not look like—it does not have the "legal character of"—a condition of subject matter jurisdiction. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982). Rather, it appears to be a procedural requirement. Jurisdiction is "the power of a federal court to act." *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 69 (1935). By contrast, certification is a prerequisite to a contracting officer's consideration

of a claim in excess of $50,000. This is akin to a filing fee or to the signature required of all pleadings in federal court. Fed. R. Civ. P. 11. *See Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) ("Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction" (citing *Snyder v. Harris*, 394 U.S. 332 (1969))). The certification requirement simply "does not speak in jurisdictional terms." *Zipes*, 455 U.S. at 395.

Not only is the language of the certification requirement non-jurisdictional in character, its location within the Contract Disputes Act itself suggests that the requirement is not jurisdictional. Jurisdiction is set forth in 41 U.S.C. § 607(d). If certification were a jurisdictional element, presumably it would appear in that section. It does not. Rather, the requirement appears in § 605(c)(1), which addresses the procedures for submitting claims to contracting officers.

Moreover, because a major focus of the CDA was the jurisdiction to be granted to the agency boards, as reflected in the legislative history, *see generally* S. Rep. No. 95-1118, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235, one must take seriously the precise language of the jurisdictional section, as well as the distinct location of the certification requirement. Under these circumstances, it strains credulity to believe that Congress could have intended the certification requirement to be a jurisdictional prerequisite.

Like reasoning persuaded this Court in *Zipes* that the timely filing of charges with the EEOC is not a jurisdictional prerequisite to filing a lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e *et seq.* That statutory filing requirement provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .

42 U.S.C. § 2000e-5(e). Noting that this provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts," the Court held that the requirement was "like a statute of limitations" and therefore "subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393-94.

There are, moreover, sound policy reasons why the certification requirement at issue in this case cannot be jurisdictional. The interpretation of jurisdictional requirements is informed by considerations of practicality. *E.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (parties "should not be compelled to jump through . . . judicial hoops merely for the sake of hypertechnical jurisdictional purity"). As a result, this Court has established bright-line tests for determining federal court jurisdiction.[9]

---

[9] For example, from the earliest days of the federal judiciary, diversity jurisdiction was decided once and for all at the beginning of the litigation. *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). This proposition was reaffirmed this Term. *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 111 S. Ct. 858, 860 (1991). Similarly, the failure of a damage award to satisfy the jurisdictional minimum does not vitiate the district court's diversity jurisdiction if the minimum was pled in good faith. *E.g., Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938).

It is an extravagant waste of resources to have jurisdiction ascertained only after plenary hearing and appeal. *Newman-Green*, 490 U.S. at 838 ("Nothing but a waste of time and resources would be engendered by . . . forcing these parties to begin anew"). This case exemplifies such waste. Grumman's claim was certified by Mr. Paladino in January 1987 prior to the review by the contracting officer. The court below issued its decision over four years later in February 1991. Under its decision, everything that happened in those years—appeal to the Board, preparation for trial, trial, briefing, and appeal to the Federal Circuit—is a nullity.

Finally, a holding that certification is jurisdictional invites manipulation and abuse. The subject matter jurisdiction of the federal courts may always be challenged. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379 (1884). When the rules governing jurisdiction are unclear, a litigant can hold back a jurisdictional challenge and argue it later if the litigation goes badly. Such a rule of law truly, as the dissent argues, "sets a trap for the unwary" and has never been countenanced by this Court. App. A, 16a. For example, in *Granberry v. Greer*, 481 U.S. 129 (1987), this Court ruled that the failure to exhaust state remedies in habeas corpus proceedings is not jurisdictional. Among other grounds for this decision, the Court fastened upon the practical: "We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' . . . is over." *Id.* at 132 (citing *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977)).

In this case, the Government's answer in the Board proceeding admitted without qualification that the

Armed Services Board of Contract Appeals had jurisdiction over this matter under the Contract Disputes Act. The Government did not argue that the Board lacked jurisdiction to consider the appeal until the record was closed.[10] To be sure, if certification is jurisdictional, the validity of the certification may be raised at any time. *E.g., Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). But the CDA's certification requirement is not jurisdictional.

In sum, nothing in the Contract Disputes Act supports the proposition that the certification requirement is jurisdictional. Rather, that requirement "goes only to [claimant]'s entitlement to relief." App. A, 17a.

---

[10] Though the Board's decision, App. B., 33a, states the Government moved to dismiss the appeal there was, in fact, no motion to dismiss. The Government's first jurisdictional argument appeared in its post-hearing brief to the Board.

CONCLUSION

For the reasons stated, the Court should grant the writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

OF COUNSEL:

MICHAEL D. POLANSKY
General Counsel
GRUMMAN AEROSPACE CORPORATION
Bethpage, New York 11714

GENE PERRY BOND
(Counsel of Record)
ROBERT L. DEITZ
LYNDA TROUTMAN O'SULLIVAN
MARTIN P. WILLARD
PERKINS COIE
Eighth Floor
607 Fourteenth Street, N.W.
Washington, D.C. 20005
202/628-6600

Attorneys for Petitioner, Grumman Aerospace Corporation

May 24, 1991

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-1217

THE UNITED STATES,

Appellant,

v.

GRUMMAN AEROSPACE CORPORATION,

Appellee.

NONPRECEDENTIAL OPINION ISSUED: October 1, 1990

PRECEDENTIAL OPINION ISSUED: February 27, 1991

Before MARKEY, *Circuit Judge,** MILLER, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

MARKEY, *Circuit Judge.*

In our non-precedential opinion of October 1, 1990, *United States v. Grumman Aerospace Corp.*, 918 F.2d 185 (Fed. Cir. 1990) (table), we vacated the decision of the Armed Services Board of Contract Appeals (Board), *Grumman Aerospace Corp.*, No. 34665, 90-1 B.C.A. (CCH) ¶ 22,417 (1989). In that vacated decision, the Board had required the United States to pay contract "costs" presented in a January 1987 claim of Grumman Aerospace Corporation (GAC). We held that the Board lacked jurisdiction because GAC failed to comply with the certification

---

* Circuit Judge Markey vacated the position of Chief Judge on June 27, 1990.

requirement of the 1978 Contract Disputes Act, 41 U.S.C. § 605(c)(1) (1988) (the statute) as implemented by Federal Acquisition Regulation 33.207(c)(2), 48 C.F.R. § 33.207(c)(2) (1989) (the regulation). On October 10, 1990, the government requested, pursuant to Rule 47.8(d), that we render our October 1, 1990 opinion precedential because of its "widespread legal interest." On October 15, 1990, GAC filed a "Petition for Rehearing and Suggestion for Rehearing in Banc."[1]

We grant the government's request, grant GAC's Petition to the extent of considering and disposing of the arguments there presented, and adhere to the result set forth in our decision of October 1, 1990.

I. BACKGROUND

This dispute began on February 10, 1986, when the Defense Contract Audit Agency (DCAA) issued forty-three Notices of Contract Costs Suspended and/or Disapproved against forty-three of GAC's cost reimbursable contracts. The notices disallowed, as contract costs, dividend payments on restricted Grumman stock awarded to GAC employees under Grumman's Restricted Stock Award Plan (RSAP). On January 7, 1987, GAC submitted an uncertified claim for the disallowed amount of $48,707 and for similar dividend payments and requested that the contracting officer render a final decision holding that RSAP dividend payments constitute allowable compensable costs. In a letter dated January 19, 1987, Mr. C.A. Paladino, Senior Vice President and Treasurer of GAC, purported to certify the previously submitted uncertified claim.

In a final decision dated March 4, 1987, the Department of the Navy's Corporate Administrative Contracting Of-

[1] On October 15, 1990, the Federal Circuit Bar Association and the Shipbuilders Council of America filed requests to participate as amici curiae. The requests were accompanied by briefs presenting the same arguments as those presented in GAC's Petition and Suggestion.

ficer (CACO) denied GAC's entire claim. GAC appealed to the Board on April 1, 1987 and the government moved to dismiss for lack of jurisdiction, contending that the claim had not been properly certified.

On October 24, 1989, the Board held GAC entitled to recover the cost of the restricted stock dividend payments to its employees. The Board denied the government's motion to dismiss, saying: "As Senior Vice President and Treasurer, Mr. Paladino was a proper official within the organization to make the certification . . . ." *Grumman*, 90-1 B.C.A. (CCH) ¶ 22,417, at 112,606. In support of that conclusion, the Board made two subsidiary findings: (1) "At the time of certification, Paladino's functions included overall responsibility for GAC's financial affairs," *Grumman*, 90-1 B.C.A. (CCH) ¶ 22,417, at 112,601 (Finding of Fact 7); and (2) "Paladino, who provided the certification, reports directly to the President of GAC." *Id.* (Finding of Fact 8). The government does not contest those findings, but says it "challenge[s] the [Board's] legal conclusion that these two findings of fact establish that Mr. Paladino was the proper person to certify GAC's claim."

GAC challenges the validity of the regulation, saying it was promulgated without legislative authority and is in conflict with the statute. In the alternative, assuming validity of the regulation, GAC contends that Mr. Paladino is an appropriate officer to certify the claim. GAC further argues that the effect of our reversal here is to require certification by, and only by, Chief Executive Officers (what GAC calls a "CEO Only" rule).

II. ISSUES

A. Whether the regulation is a reasonable interpretation of the statute.

B. Whether the government properly raised an issue of the Board's jurisdiction.

C. Whether GAC complied with the statute's certification requirement, as implemented by the regulation, with its January 19, 1987 letter signed by Mr. Paladino.

III. OPINION

A. Validity of the Regulation

The statute provides in pertinent part:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

Clearly, certification is required for claims in excess of $50,000. *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983).

The regulation provides that individuals who may properly certify non-individual contractor claims amounting to more than $50,000 may be drawn from either of two categories:

> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

GAC contends that the regulation is invalid to the extent that it imposes certification requirements beyond "the contractor shall certify" language of the statute. GAC would apply agency principles to determine who may properly certify the contractor's claims. However, nothing in the statute nor in its legislative history either requires or suggests that approach. The statute, being silent on the ques-

tion of the individual who may certify a claim for a non-individual contractor, leaves a gap. GAC fails to distinguish between a prohibited ultra vires regulation and a permissible act of administrative gap-filling.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court held that

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

(footnotes omitted); *see also New York Guardian Mortagee Corp. v. United States*, 916 F.2d 1558, 1559 (Fed. Cir. 1990). The regulation is clearly within the congressionally delegated authority of the Office of Federal Procurement Policy "to issue guidelines with respect to criteria for the . . . functions . . . of the agency boards . . . " that "may be necessary or desirable to carry out the provisions of this chapter . . . . " 41 U.S.C. § 607(h) (1988). Further, it is entirely consistent with the statutory section here involved, merely serving to fill the gap implicitly left by Congress respecting *who* may certify pursuant to that section. As this court has noted:

> The [CDA] merely provides that "the contractor shall certify." *The regulation constitutes a reasonable explication of how the "contractor" shall certify, i.e., it identifies the individuals*

> *within the contractor's organization who properly may act for the contractor in certifying. Cf. INS v. Jong Ha Wang*, 450 U.S. 139, 144-45, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981). In terms of Admiral Rickover's suggestion, the regulation specifies the "senior responsible contractor official[s]" who are authorized to sign the certification.
>
> The certification requirement furthers an important objective of Congress by "trigger[ing] a contractor's potential liability for a fraudulent claim under section 604 of the Act," *Skelly & Loy v. United States*, 231 Ct. Cl. 370, 685 F.2d 414, 418 n. 11 (1982), and thus " 'discourag[ing] the submission of unwarranted contractor claims.' " *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354 (Ct. Cl. 1982) (quoting S.Rep. No. 1118, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S.Code Cong. & Admin. News 5235, 5239). "Congress wanted to hold the contractor personally liable, and it considered the best way to do this would be to require contractors personally to certify their claims." *Donald M. Drake Co. v. United States*, 12 Cl. Ct. 518, 519 (1987). *The regulation properly implements this objective by specifying the persons in the contractor's organization who may certify a claim.*

Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426, 1429 (Fed. Cir. 1989) (emphasis added).

Accordingly, we decline GAC's invitation to ignore *Ball* as precedent. On the contrary, we expressly hold that the regulation is not unreasonable, and that it is in furtherance of congressional objectives, is unambiguous, and must be applied literally. *See id.* (holding the regulation "unambiguous" and directing that it be applied "as written"). In sum, the regulation being reasonable, this court may not

substitute its own construction of the statutory provision on which it rests. Nor is the writing or amendment of regulations our proper role. Whether it would to us appear sensible, for example, to allow a senior financial officer to certify a claim for money allegedly owed his corporation is simply irrelevant. We are not privy to all of the agency's reasons for its regulation and lack the expertise developed over the years by the agency in dealing with all aspects of certification. Hence, GAC's arguments based on policy and practicality must be rejected.

B. Jurisdiction

It is well settled that the certification requirement is a jurisdictional prerequisite that must be satisfied by the contractor before it may appeal the contracting officer's claim denial. *See Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989).

GAC argues that compliance with the certification requirement is not a jurisdictional requirement. The argument fails in light of the extensive case law holding otherwise. *See, e.g., Theon v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985) ("Congress has determined that submission of a certified claim to the contracting officer in the first instance is a jurisdictional prerequisite . . . . "); *W.M. Schlosser Co.*, 705 F.2d at 1338 ("Unless the claim was certified when it was submitted to the contracting officer, the Board should have neither heard nor ruled on the appeal."); *Milmark Servs., Inc. v. United States*, 231 Ct.Cl. 954, 956 (1982) ("It is well established that without such a formal claim and final decision by the contracting officer, there can be no appeal to this court under the CDA. It is a jurisdictional requirement."); *W.H. Moseley Co. v. United States*, 677 F.2d 850, 852 (Ct.Cl.) ("Since plaintiff failed to certify its claim as required by section 6(c)(1) of the Contract Disputes Act of 1987, we are without jurisdiction to consider its direct appeal to this court."), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 77

(1982); *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982) ("Unless [the certification] requirement is met, there is simply no claim that this court may review under the Act."); *Triax Co. v. United States*, 20 Cl. Ct. 507, 509 (1990) ("It is well settled that the submission of a properly certified claim to the CO is a jurisdictional prerequisite . . . . "). We see no reason to upset this long-established and well-reasoned precedent.

GAC also argues, now, in its Petition and Suggestion, that the jurisdictional issue should not have been addressed because no certifying signature is required for claims of less than $50,000. The government correctly points out that this is "a new argument that was not presented during the [Board] hearings or to this Court in either its brief or at oral argument." Consequently, GAC is precluded from raising its "need not have been certified" argument at this late date. *See Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 767 (Fed. Cir. 1988); *JMT Mach Co. v. United States*, 826 F.2d 1042, 1048-49 (Fed. Cir. 1987).

Beyond the general rule that jurisdictional facts may be waived if not timely pleaded, GAC's argument respecting the amount of the claim is particularly egregious in light of a colloquy during the Board hearing. When a Member of the Board raised the question, government counsel stated that the total claim exceeds $50,000, and GAC's counsel did not dispute government counsel's exposition. In light of that colloquy, GAC's assertion that its own counsel did not himself assure the Board that its claim exceeds $50,000 comes with poor grace. It is unavailing and inappropriate.

Subject matter jurisdiction may be addressed at any time. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1985). Strictly speaking, however, the Board's subject matter jurisdiction, i.e. its jurisdiction to hear and determine appeals from final decisions of contracting officers on certifying

claims, remains fully intact whatever is done here. Failure of a claimant to certify the claim results in an inability of the Board to exercise its subject matter jurisdiction in that claimant's case. A purist might for that reason view a claimant's failure to certify as a defect in the claimant's standing. On the other hand, it can be said that Congress limited the Board's jurisdiction over contractor's claims to those that are certified. It is in the sense that the Board is given no power to exercise jurisdiction over uncertified claims that the courts have designated certification as "jurisdictional."

Thus GAC's arguments that certification is not jurisdictional and that jurisdiction was present because the claim was for less than $50,000 must be and are rejected.

C. Compliance

GAC says it complied with the regulation because Mr. Paladino was a proper person to certify the claim. Under the regulation, as above indicated, compliance would require certification by *either* "[a] senior company official in charge at the contractor's plant or location involved . . . " *or* "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." Mr. Paladino fits neither description.

The first description demands that the certifying senior company official have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity. Mr. Paladino, as GAC's Senior Vice President and Treasurer, was certainly a "senior company official," but he was not "in charge." He reported at least to Nat Busi, a GAC Vice President and GAC's Controller, who testified that it was he, not Mr. Paladino, who "made the ultimate decision" to present the claim, and that Mr. Paladino "could not pursue the claim . . . without [Mr. Busi's] approval . . . . " There is no indication that Mr. Paladino was responsible for anything more than simply deciding and reporting on whether par-

ticular dividend-like costs were employee compensation chargeable to a series of government contracts. Moreover, GAC has not established that Mr. Paladino was physically present at the "plant or location involved" in the performance of the contract.

The second description requires "overall responsibility for the conduct of the contractor's affairs" in general. The Board said "Paladino's functions included overall responsibility for GAC's financial affairs." However, the regulation requires more than that, and clearly, an individual having overall responsibility for just the contractor's financial affairs would not fit the description. *Ball, Ball & Brosamer*, 878 F.2d at 1429 (holding that an official whose responsibility is limited to financial aspects of a contractor's affairs is not the proper person to certify a claim). GAC has not met its burden of establishing that Mr. Paladino had the overall responsibility for the conduct of GAC's affairs required by the regulation.

GAC grossly exaggerates in arguing that this court held in its earlier opinion, at least by implication, that a corporation's CEO is the only individual that may certify a corporate contractor's claim. Certainly a CEO or one of equivalent status would satisfy the second description, but certification by a CEO is not required by the regulation or by anything said in either of this court's opinions in this case. Indeed, any such requirement would read the first description completely out of the regulation. We hold only that GAC has failed to establish that Mr. Paladino satisfied either requirement of the regulation.

Because the Board's determination that Mr. Paladino was qualified to certify GAC's claim was not supported by substantial evidence, we vacate the Board's decision and remand the case with instructions to dismiss GAC's appeal from the CACO's denial of the claim.

GAC, however, is not without a remedy. Notwithstanding a holding that the Board lacked jurisdiction because

certification was lacking, this court has held that a contractor may properly certify the claim and resubmit it to the contracting officer, and if denied relief the contractor may appeal either to the Board or to the Claims Court. *See Theon v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985); *see also Skelly and Loy v. United States*, 685 F.2d 414, 419 (Ct.Cl. 1982) ("The proper course of action—for a contractor whose case is dismissed for lack of jurisdiction—is the following: (1) properly certify the claim; (2) resubmit the claim to the contracting officer; and (3) if there is then an adverse contracting officer's decision, appeal either to the board (section 606) or directly to this court (section 609).") (footnote omitted). The record does not reflect GAC's reason for declining to submit a new certification in response to the government's motion to dismiss or at any time during the ensuing three years. We will, however, presume existence of a reason sufficiently strong to justify the GAC-induced expenditures of the overburdened resources of the Justice Department, the Board, and this court.

VACATED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1217

THE UNITED STATES,

Appellant,

v.

GRUMMAN AEROSPACE CORPORATION,

Appellee.

PLAGER, *Circuit Judge*, with whom NEWMAN, LOURIE and RADER, Circuit Judges, join, dissenting from the Court's refusal to consider this case in banc.

I respectfully dissent from the Court's refusal to consider this case in banc and to affirm the Armed Services Board of Contract Appeals' (Board) jurisdiction to decide the case.[1] As discussed at the outset of the panel opinion, that opinion had a difficult gestation period, followed by a painful birth. In its original conception, the panel produced a nonprecedential opinion that I believed to be erroneous but, due to its nonprecedential nature, not broadly significant. Had the matter remained merely one of bad result the case might not warrant our continued attention. But by acquiescing in the Government's request for a precedential opinion, this court sets forth a major policy pronouncement that, in my judgment, is simply wrong. In view of the public interest in this issue (as evidenced by the briefs of *amici* cited in the panel opinion) and the importance of its correct resolution to the boards and

---

[1] Under Fed. R. App. P. 35(a), a majority of the active judges of this court may, *sua sponte*, order a case to be reheard in banc. In this case, in response to a suggestion from several members of the court, a majority of the active judges did not so order.

courts that hear these cases,[2] I think it appropriate that I state why I believe the decision is wrong.

The panel's pronouncement regarding what is required to certify a claim is not good law. The statute, 41 U.S.C. § 605(c)(1) (1988), requires that "the contractor" certify the claim. The purpose of the certification requirement is clear from the legislative history—the certifier must be an official able to speak for and bind the company regarding the claim. In addition, the legislative history suggests that this mechanism is to prevent fraudulent claims and encourage settlements. Thus, Congress seemingly wanted the person who makes the final decision concerning submission of a claim to be someone with reasonably broad oversight of the company's affairs and not merely a person with an emotional investment in the dispute. Such a person could best determine whether the claim was justified or able to be settled. Indeed, the Office of Management and Budget's Office of Federal Procurement Policy (OMB/OFPP) rule, describing eligible certifiers as including the chief executive officer (CEO) who heads the entire company, clearly

---

[2] *See, e.g., Sun Cal, Inc. v. United States*, 21 Cl. Ct. 31, 33-34 (1990) (finding a vice-president and chief financial officer qualified to certify); *Westech Corp. v. United States*, 20 Cl. Ct. 745, 751-53 (1990) (finding certification of claim by former employee of the contractor in combination with a subsequent ratification by the corporation president to be ineffective); *Western Empire Constructors, Inc. v. United States*, 20 Cl. Ct. 668, 671 (1990) (finding a project manager to be a "senior company official in charge at the contractor's plant"); *Triax Co. v. United States*, 20 Cl. Ct. 507, 510-14 (1990) (on reconsideration, an order finding a certification invalid where the senior company officials certifying were not also in charge of the plant was vacated); *National Surety Corp. v. United States*, 20 Cl. Ct. 407, 410-12 (1990) (finding certification by an officer of the parent corporation to be ineffective); *Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 736 (1990) (finding use of "*a* senior company official" rather than "*the* senior company official" in regulation to indicate that certification must be by "a senior official within the company, not just the most senior person on site.")

suggests that no personal involvement in the routine paperwork administration of the contract is expected.

Courts appropriately accord considerable weight to interpretations of an agency with expertise when a statute is ambiguous. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). As we said in *Wilson v. United States*, 917 F.2d 529, 535-36 (Fed. Cir. 1990) (citing *Chevron* at 842-44), "when a statute is silent or ambiguous with respect to the specific issue, the administrative agency's interpretation, if reasonable, is to be followed by the court." Courts thus acknowledge the proper role for experts in policymaking. At the same time, we should refuse to enforce agency interpretations when the statute is not ambiguous and when the interpretation neither demands expertise of an agency nor accords with the thrust of the statute. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). As was said in *Office of Communication of the United Church of Christ v. Federal Communications Comm'n.*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983), "[t]o do otherwise would risk diluting the judiciary's power to stand guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority. Indeed, it is the quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority."

The term "contractor" as used in 41 U.S.C. § 605 of the Contract Disputes Act (CDA) is not ambiguous. The statute simply leaves unspecified the exact title of the certifying official appropriate in a given case and in a given corporate structure. Even assuming agency interpretation was needed, the regulation, 48 C.F.R. § 33.207(c)(2) (1989), by limiting the range of officials able to certify as narrowly as it does, goes beyond reasonable interpretation and denies to a wide range of corporate officials that which the statute grants them. Furthermore,

§ 601 of the CDA defines the term "contractor." Congress, by defining "contractor" even in general terms left no room for agencies to adopt stricter or looser definitions of the term. This court should give force to Congress's language and intent.

The statute delegates *to the contractor* the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures. For example, a valid regulation might specify that the officer who certifies for the contractor must be one whose position within the contractor's organization is such that he or she has authority to speak for and to bind the corporation concerning the matters involved in the claim. By contrast, a regulation that stated that corporate vice-presidents could *never* certify a claim would not be consistent with the statute and therefore would not be valid—this regulation as construed by the panel does essentially that, and it is not.

The facts of this case demonstrate the unreasonableness of OMB's regulation, at least as it is construed by the panel. The subject matter of the claim is whether certain dividend payments on stock awarded to the contractor's employees are includable elements in cost reimbursable contracts. The officer certifying the claim was the corporation's Senior Vice President and Treasurer. Obviously, such an official would be among the most knowledgeable and responsible in assessing such a claim. Can it be said that the Congress had in mind that *only* the civil engineer who is the plant manager could certify the claim if the president of the company was busy doing other things? (What if there are a number of plants affected? What if there were a "Senior Vice President for Certifying CDA Claims"?) Or, if the manager at one of many plants of a large corporation was ill, can it be said that Congress intended to require that the CEO, located in corporate headquarters 2000 miles from the plant, personally certify a $55,000 claim on a $400 million contract?

The Board of Contract Appeals which heard this case considered the Senior Vice President a proper certifier on the grounds that he met the regulation's description of an officer having overall responsibility for the conduct of the contractor's affairs, in this case, financial affairs. The panel disagreed, concluding that the regulation means affairs *in toto*, i.e., the CEO. Either the panel or the regulation is wrong. In either case, the rule announced by the panel should not be allowed to become a binding precedent of this court.

If the Government is genuinely in doubt about the authority of the certifier to bind the contractor, it is a simple matter for the Government to challenge this authority before the Board. It would be equally easy for the contractor to then verify that authority. But that is not what the Government seeks. The Government's position instead sets a trap for the unwary, requiring that claims falling short of its technical trap be re-started, thus giving the Government more years to avoid paying its just debts, if they are ultimately found to be just, and to deny the contractor the interest on the money due that the statute requires be paid. The large defense and other contractors who regularly do business with the Government, and who have the legal resources to closely follow the arcane requirements laid down in this area, will find the certification process imposed by this decision onerous but manageable. It is the small companies who seldom do business with the Government and who can least afford delayed payments with no interest paid for the delay, who likely will be caught and most hurt by this construction of the regulation. This court should not countenance any such distortion of the remedial purposes of the Contracts Dispute Act.

Finally, the court lets pass an opportunity to correct what I consider a long-standing error, judicially created, regarding the jurisdiction of the boards and courts which hear these cases. The panel opinion holds that the failure to properly certify the claim deprives the Board, and there-

fore this court, of jurisdiction over the cause. But failure to properly certify a claim under the CDA does not speak to subject matter jurisdiction—it merely means that the particular claimant has failed to state a claim for which, under the terms of the statute, relief may be granted. Subject matter jurisdiction over CDA claims is determined by statute granting that jurisdiction to specified boards and courts. A party's failure to do all that is required to certify a claim goes only to that party's entitlement to relief. To confuse the two creates not only analytical difficulties, but practical ones as well. Admittedly, the panel is correct that the error is long-standing (see the discussion under *Jurisdiction* in the panel opinion), but that is no reason to continue its perpetuation since no investment expectations are likely to have been made in reliance on it. This whole area could benefit from a thorough reexamination by the court in banc.

APPENDIX B

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 34665

Appeal of –

Grumman Aerospace Corporation

Under Contract No. N00014-82-C-2418, et al.

APPEARANCES FOR THE APPELLANT:

Gene Perry Bond, Esq.
Lynda Troutman O'Sullivan, Esq.
John M. Devaney, Esq.
Perkins Coie
Washington, D.C.

APPEARANCES FOR THE GOVERNMENT:

C. John Turnquist, Esq.
Navy Chief Trial Attorney
James T. DeLanoy, Esq.
Senior Trial Counsel
Anne Davenport, Esq.
Trial Attorney, NAVPRO
Bethpage, New York

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

At issue in this appeal is whether dividend payments [1] made to employees of Grumman Aerospace Corporation on restricted Grumman Corporation stock previously awarded to said employees are allowable compensation expenses.

---

[1] At trial and in the briefs the parties used the term dividend equivalents to describe dividends on restricted stock in order to distinguish it from dividends on unrestricted stock.

The contracting officer determined that the payments were not compensation for services rendered and were disallowed. This appeal followed.

The record consists of the transcript of a two-day hearing at the Board, a stipulation of facts by the parties, documents submitted by both the Government (R4, tabs 1-19) and Appellant (R4, tabs 20-124) pursuant to Board Rule 4 and appellant's exhibits received at the hearing (exh. A-1-3). Also included in the record are prefiled statements of three expert witnesses. The appeal is processed under the Contract Disputes Act of 1978, 41 U.S.C. § 601-613, and only entitlement is at issue.

FINDINGS OF FACT

1. Grumman Corporation (Grumman or GC) is duly authorized and existing under the laws of the State of New York and has a wholly-owned subsidiary, Grumman Aerospace Corporation (GAC), also a New York corporation (Stipulation ¶ 1). GAC is the appellant in this appeal.

2. GC views a well-balanced compensation program for its senior executives to be comprised of three elements — the base salary, an annual bonus opportunity reflecting performance during a particular period and finally a long-term incentive compensation element which usually takes the form of a stock ownership opportunity. The stock programs tend to align the interests of the individual with the interests of the shareholders. (Tr. 1/29)

3. GC has included a stock option program as part of its compensation package for many years, but because of its shortcomings, such as unattractive prices, management felt it should investigate the alternative of a restricted stock award plan. The firm of Booz, Allen & Hamilton, which was commissioned to study the matter, recommended that the company adopt a restricted stock program. (Tr. 1/29-30)

4. In March 1978, the Board of Directors of GC approved a Restricted Stock Award Plan (RSAP) subject to shareholder approval which approval was granted and became effective in July 1978 (Stipulation ¶ 4).

5. The first awards of restricted stock pursuant to the RSAP were made in September 1978. In 1980, GAC first claimed dividend payments made on the restricted stock issued under the RSAP as a contract cost in its final overhead and G&A rate submissions for 1979. (Stipulation ¶ 5)

6. The parties agreed to a bottomline number to settle final overhead and G&A rates for the years 1979 through 1982, with neither party making any concession, admission, or reservation of rights regarding dividend payments made on restricted stock awarded under the Grumman RSAP (Stipulation ¶ 7). The question of the allowability of dividend payments on restricted GC stock is an open item for 1983 and forward. (Tr. 2/17)

7. On 10 February 1987, the Defense Contract Audit Agency (DCAA) issued forty-three token Notices of Contract Costs Suspended and/or Disapproved (Forms 1) against forty-three of GAC's cost-type contracts. The token Forms 1 disallowed the cost of payments made on restricted shares under the RSAP for the year 1983 in the total amount of $48,707. (Stipulation ¶ 6) The disallowed amount was withheld from GAC billings in April of 1986. On 7 January 1987 GAC submitted an uncertified claim for the amount withheld. (R4, tab 16) On 19 January 1987, the claim was certified by C.A. Paladino, Senior Vice President and Treasurer of GAC, using the language prescribed by Section 6(c)(1) of the Contract Disputes Act of 1978 (41 U.S.C 605(c)(1)) for claims exceeding $50,000. At the time of certification, Palidino's [sic] functions included overall responsibility for GAC's financial affairs. The claim was denied by the administrative contracting officer on 4 March 1987 (R4, tab 18).

8. Paladino, who provided the certification, reports directly to the President of GAC.

Purpose of RSAP

9. The objective of the RSAP is to attract good employees, to retain them, and to compensate them fairly for their performance. (Tr. 1/32) There is intense competition for highly trained and experienced technical personnel in Long Island, New York (Grumman's corporate home). (Tr. 1/59) Retention of these highly trained and experienced personnel is essential to maintaining Grumman's position on the cutting edge of technological development and the RSAP has been successful in achieving the objective of retaining these employees. (Tr. 1/60)

10. While the RSAP has existed in GC since 1978, the number of persons who have received awards are a select few, mostly high level employees. Persons receiving awards for the most part had never heard of the plan prior to receiving the award as information about the plan is not given until receipt of an award. (Tr. 1/133, 216)

11. Awards are made at management discretion and there is no guarantee of an award no matter the level of performance. (Tr. 1/124, 1/134)

Comparison of Restricted Stock versus Regular Stock

12. Restricted stock of Grumman Corporation has some but not all the characteristics of ordinary common stock of Grumman Corporation. Recipients of restricted stock may not sell, transfer, pledge or otherwise hypothecate the stock until after a fixed period of time, usually the fifth year, when the restrictions begin to lapse at the rate of 20% per year. (Tr. 1/63, 1/109-110) If a recipient leaves Grumman or any of its subsidiary corporations while there are restrictions on the shares, the restricted stock is forfeited and the right to receive dividends thereon terminates. (Tr. 1/64-65) A recipient does not forfeit shares on

which the restrictions have lapsed when he or she leaves Grumman or any of its subsidiary corporations.

13. Recipients of restricted stock get the same annual report, the same quarterly statement and the same proxy as any other shareholder. They have the same right to attend annual meetings and their votes count in the same manner as any other shareholder. (Tr. 1/45) As well, recipients of restricted stock receive the same gross quarterly dividends declared by the Grumman Board of Directors (tr. 1/216).

14. When an award of restricted stock is made, the stock is listed in the participant's name with a notation of the restrictions which apply and these shares are placed on deposit and retained by the company, as the individual does not receive physical possession of the certificate (tr. 1/47-48, 1/63-64) as they would with ordinary common stock.

15. As the restrictions lapse and the shares begin to vest in the individual, a certificate is issued for the amount of shares so vested and the individual receives the certificate free and clear and subsequently receives dividends on those shares in the normal manner.

16. There have been some exceptions made by Grumman to the rule that restricted stock is forfeited when an employee leaves Grumman. the first is where an employee leaves the company but is retained in a consulting capacity. In these circumstances, Grumman has allowed the original lapsing schedule to run to avoid forfeiture because of the continuing business relationship. (Tr. 1/37)

17. A second exception is where a segment of the corporation is sold and that segment has employees holding restricted stock, Grumman deems service with the new owners to constitute service with Grumman for the limited purpose of the restricted stock in fairness to the employees since it was a company decision to sell. (Tr. 1/38) A third

exception is where a departing employee enters into a noncompete agreement. The company deems this situation equivalent to consulting for purposes of allowing restricted stock lapsing to continue so as to avoid forfeiture. (Tr. 1/49) It should be noted that the plan itself provides that if a recipient "is terminated prior to the lapse of the restriction on his Restricted Stock by reason of death, total disability, or retirement at normal retirement age 65, or later, the restrictions on the Award shall lapse on the date of such termination." (R4, tab 3, ¶ 11).

Comparison of Dividends on Restricted Versus Dividends on Ordinary Stock

18. Retained earnings are a residue of profits that have not been distributed. The payment of dividends, including dividends on restricted stock, out of retained earnings is contingent upon a declaration by the Board of Directors of Grumman Corporation not by GAC. (Tr. 2/33)

19. Dividends on ordinary common stock are paid by a transfer agent or dividend dispersing [sic] agent while dividends on restricted stock are paid by the company (1/40). A separate bank account is maintained for dividend payments on restricted stock because the company views these payments as part of the total payroll picture and wishes to maintain control of it while dividends on regular common stock are not part of the payroll process and there are no company tax concerns. (Tr. 1/200)

20. The tax concerns of the company include the requirement by the Internal Revenue Service that they make tax withholdings on restricted stock dividends which withholdings are reported on Form W-2 along with an employee's base compensation. Thus, the dividend payment received by recipients of restricted stock is net of federal and state tax withholding (tr. 1/52). This differs from dividend payments on ordinary common stock as, for the latter, there is no withholding required and payments are reported to the IRS on Form 1099. (Tr. 1/40)

21. Payment of dividends on regular common stock is not contingent upon performance of services or employment with the company, while payment of dividends on restricted stock is contingent, subject to the exceptions noted above, upon employment with the corporation. (Tr. 1/40-41)

Tax Consequences of RSAP

22. At all times relevant to this appeal, Douglas Dahlgard has been Director of Taxes for Grumman Corporation and at the time the RSAP was proposed he was asked to research and comment on the tax consequences of the plan. (Tr. 1/157-58) He did so and testified as to his conclusions as follows:

> I concluded that the tax treatment as described by the consulting firm was correct and that upon the grant of restricted stock award there is no tax consequences [sic] to the recipient nor is there a tax consequence to Grumman.
>
> On payment of dividends that relate to shares that are still restricted under the award program, the dividends are properly treated as compensation by the individuals and are deductible as compensation paid by the company [GAC].
>
> Once the restrictions lapse on the shares when the service has been performed under the schedule on the plan, there is a taxable event to the recipients and that is measured by the fair market value of the stock on the date that the forfeiture restrictions lapse. That tax consequences [sic], the fair market value of that award at that time, represents compensation to the individuals. It also represents an allowable compensation deduction to the company.

(Tr. 1/159-60)

23. Dahlgard's conclusion with respect to the tax consequences was based in large part on section 83 of the Internal Revenue Code which, in dealing with the transfer of property for services when the property is subject to restrictions, states that there is no transfer of the restricted property for tax purposes as ownership only transfers upon the lapse of the restrictions. Money paid to award recipients represents additional compensation and thus is taxable as ordinary income to the recipient and is deductible as compensation by the company. (Tr. 1/160-161)

24. GAC witnesses, who testified that in their opinion the payment of dividends on restricted stock is allowable for government contract costs purposes, viewed the tax consequences as highly relevant to the analysis leading to that conclusion. Government witnesses, on the other hand, found little, if any, relevance between the tax consequences and the question of whether the payments are allowable.

How Restricted Stocks are Treated for Accounting Purposes

25. Nat Busi is vice president and comptroller of Grumman Corporation. (Tr. 1/182) He testified about the financial and cost accounting treatment of restricted stocks and dividends issued thereunder. During development of the plan, Busi advised the corporation on how he saw the impact of the plan on accounting and contract costs as they affected GAC and thus his concern was both financial accounting and Government contract cost accounting. (Tr. 1/186) He concluded that accounting conventions required that dividends on restricted stock be reported as if they were ordinary dividends for Grumman Corporation. However, since the effect of the plan was to augment a compensation package, Busi concluded that when the cost of the dividends was passed on to the operating units of Grumman such as GAC, the costs should be recorded as compensation costs and reported accordingly. (Tr. 1/186-

87) Busi agreed on cross examination that financial accounting was relevant to the accounting treatment for the parent Grumman Corporation and that cost accounting was relevant to treatment at the segment level of the contractor, GAC. (Tr. 1/187-88)

26. The only accounting entry normally made for dividends is at the parent level wherein Grumman reduces the retained earnings of the corporation and pays the dividends to the holders of the Grumman stock. There would be no accounting entries at all on the books of the segments or operating units (tr. 1/188). For dividends on restricted stock the accounting at the segment level is explained as follows:

> Now with respect to the dividends paid on restricted stock, Grumman Corporation would pay the holders of restricted stock and then would set up a receivable from the operating units, in this case, Grumman Aerospace Corporation, for the dividends that Grumman Corporation had paid to employees of Grumman Aerospace that held restricted stock shares.
>
> Grumman Aerospace would reimburse Grumman Corporation for the dividends that they had paid. Grumman Corporation would pay the withholding taxes which it had withheld to Grumman Aerospace and Aerospace would then remit those taxes to the taxing authority. Just to keep the payroll taxes complete, Aerospace would do that. Aerospace would similarly pay any FICA taxes that might be due on those payments.

(Tr. 1/188-89)

27. While GAC does not now have any financial reporting requirements to third parties other than its parent, Grumman (tr. 2/40-41), for 1984 and 1983 GAC did issue financial statements separate from Grumman. (Tr. 2/13;

exh. A-3) Michael Solomita, Assistant Treasurer of GAC (tr. 2/7), testified that dividends on restricted Grumman stock paid to GAC employees appear in two places on the certified financial statements — on the Consolidated Balance Sheets as an asset under net inventories, and on the Consolidated Statements of Income and Retained Earnings under Wages, Materials and Other Costs and Expenses. (Tr. 2/13-14) He explained the rationale for inclusion in two places as follows:

> They're in two places because all contract costs are reflected: first, as inventory; then, as sales are made. The inventory accounts are relieved for the costs that are associated with those sales. And at that point in time, some portion of the dividends on restricted stock would appear as an income item—or an expense, rather, and would appear as part of this "Wages, Material, and Other Costs and expenses."
>
> The balance of the amount remains in the inventory account until additional sales are generated and those costs are then transferred out into cost of sales.

(Tr. 2-14-15)

28. Solomita explained how the parent and the segment account for dividends on restricted stock:

> The parent company records these dividends as a charge to retained earnings, a financial item, and as a credit to cash. They make a simultaneous entry, which would be a billing to each of the divisions or segments of Grumman Corporation, wherein they would debit account called "Due from Affiliate," whichever affiliate it happened to be, and credit "Miscellaneous Income."
>
> When the corporation receives payment from the various divisions, they would charge their cash

account and relieve the "Due from Affiliate" account.

* * *

Upon receipt of the invoice from Grumman Corporation, the unit that I work for [GAC] makes a charge to compensation expense as an allowable contract cost and sets up a liability to Grumman Corporation.

Subsequently, when payment is made to the corporation, the liability account is relieved and the cash account is credited.

(Tr. 2/12-13)

29. Financial accounting conventions (generally accepted accounting principles) require that dividends not be shown as an expense on the consolidated financial report of the corporation and the accepted practice is to treat dividends on restricted stock in the same manner. (Tr. 1/197, 1/206) Grumman follows that practice and shows dividends paid on restricted stock as dividends paid and reduces the shareholder's equity account by the amount of the dividends paid and does not show these payments as expenses or income for financial reporting purposes. (Tr. 1/213)

30. Grumman does not normally bill dividends to its segments, except in the case of dividends on restricted stock and it only bills the segments during the period before the restrictions lapse. Grumman would not bill its segments for the dividends on restricted stock shares if they were not treating them as a compensation expense. (Tr. 1/213-14)

The Expert Witnesses

31. Heidi Toppel, a compensation consultant, was called as an expert witness by appellant. In her prefiled testimony, Toppel expressed the opinion that the RSAP of Grumman was compensatory in nature (Toppel Q&A No.

31) and that dividend payments on restricted stock under the Grumman RSAP is also compensation, stating:

> A dividend equivalent associated with the RSAP is compensation and is an integral part of the incentive compensation nature of the program. They are distinctly different from ordinary dividends paid to shareholders. Ordinary dividends paid to shareholders are not treated as an operating expense to the company but rather a return of profit on their equity interest. The dividend equivalents paid in accordance with the terms of the RSAP are interim payments to employee recipients of restricted stock awards for the performance of their services during the period to which the dividend equivalents relate. The dividend equivalents are an integral part of the plan to compensate Grumman employees and should not be characterized as transactions with shareholders.
>
> In my view it is arbitrary to identify one aspect of a [sic] incentive compensation program such as the RSAP and contend that it does not constitute compensation simply because it is labelled a dividend or is measured by the amount of a regular dividend.

(Toppel Q&A No. 34)

32. Appellant also called Dr. Louis Rosen, an attorney and a certified public accountant, as an expert witness. When asked his opinion of whether payments to recipients of awards under the Grumman RSAP are allowable costs, he stated:

> My opinion is that the payments to the RSAP recipients that are made while the recipients are holding restricted stock are allowable costs. Unlike true dividend payments to regular stock-

> holders, the payments to the employees who hold restricted stock ("dividend equivalent payments") are contingent upon their continuing performance of services until the restrictions lapse. For this reason, and in consideration of other factors (e.g., that the applicable tax regulations provide that payments on restricted stock are to be treated as compensation), it is my opinion that the dividend equivalent payments made pursuant to Grumman's RSAP are allowable compensation costs.

(Rosen Q&A Nos. 8 and 9)

33. Rosen went on to explain that his opinion was formed after looking to other sources for guidance, including, the RSAP itself, Government contract cost principles and the Cost Accounting Standards, federal tax provisions as they relate to payments on restricted stock programs, Grumman's and GAC's accounting treatment of the RSAP stock and dividends, and fundamental accounting principles (Rosen Q&A No. 10).

34. The Government called Bertold Bodenheimer, a certified public accountant, as an expert witness who expressed the opinion that payment of dividends on restricted stock are dividends and not compensation and thus not allowable, stating:

> Such payments are represented in the company's description of the plan as being dividends. They are treated by the company's independent public accountants as dividends. The payments are made on the basis of a dividend declaration by the Board of Directors. They are unrelated to services performed by the recipient in the period when the payments are made. The payments are of a type which the Internal Revenue Service would question as a compensation deduction. Consequently, the evidence is overwhelming that the

> payments in question are not compensation for services rendered by employees, but dividends on shares in the company.

(Bodenheimer Q&A Nos. 12 and 25)

The Contracts and Cost Principles

35. Contract No. N00014-82-C-2418 (a typical contract included in the Rule 4 file) was awarded on 29 September 1982. The contract incorporated by reference the Allowable Cost Fixed Fee and Payment clause (September 1978 edition) prescribed at DAR 7-203.4(a). Said clause provides in pertinent part that the Government should pay the cost of performance determined to be allowable under Part 2 of Section XV of the Armed Services Procurement Regulations in effect on the date of the contract. The contract also incorporated the Disputes Clause prescribed at DAR 7-103.12, June 1930 edition.

36. The provisions of Part XV which are discussed below were in effect on the date of the contract and are relevant to this appeal.

37. The cost principle set forth in subpart (a)(1) of DAR 15-205.6, Compensation for Personal Services, is broadly stated as follows:

> Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided in 15-205.6(f). It includes, but is not limited to, salaries, wages, directors' and executive committee members' fees, bonuses (including stock bonuses), incentive awards, employee stock options, employee insurance, fringe benefits, contributions to pension, annuity, and management employee incentive compensation plans, allowances for off-site pay,

> incentive pay, location allowances, hardship pay and cost of living differential. Except as otherwise specifically provided in this 15-205.6, such costs are allowable to the extent that the total compensation of individual employees is reasonable for the services rendered and they are not in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder.

38. The cost principles allow for the payment of bonuses and incentive compensation in pertinent part as follows:

> Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards, and incentive compensation based on production, cost reduction, or efficient performance, are allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently a to imply in effect, an agreement to make such payment . . . .

(DAR 15-205.6(c))

39. While DAR 15-205.6 specifically lists various forms of compensation, including stock bonuses and stock options, the DAR principle does not specifically mention dividend payments of any kind.[2]

---

[2] Effective 22 March 1983 the DAR specifically disallowed dividend equivalents on phantom stocks (DAR 15-205.6(i)(3). Companies with phantom stock plans attribute contingent shares of stock to employees as if the employees own the stock even though they do not. An employee's account may be increased by the equivalent of dividends issued on the stock and by appreciation in value of the stock. The cost prin-

40. DAR 15-204(d) provides:

> Selected items of cost are treated in 15-205. However, 15-205 does not cover every element of cost and every situation that might arise in a particular case. Failure to treat any item of cost in 15-205 is not intended to imply that it is either allowable or unallowable. With respect to all items, whether or not specifically covered, determination of allowability shall be based on the principles and standards set forth in this Part and, where appropriate, the treatment of similar or related selected items.

41. DAR 15-205.6(j) provides:

> Costs which are unallowable under other paragraphs of this Part 2 of Section XV shall not be allowable under 15-205.6 solely on the basis that they constitute personal compensation.

DECISION

Preliminary Matter

The Government moves to dismiss the appeal because of a faulty certification based upon its view that Mr. Paladino was not the proper official within the corporation to sign the certification. As Senior Vice President and Treasurer, Mr. Paladino was a proper official within the organization to make the certification and we therefore deny the motion to dismiss. *Cf Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir 1989); See *McDonnell Aircraft Company*, ASBCA No. 37346, 89-2 BCA ¶ 21,820.

---

ciples applicable to this appeal did not preclude dividend equivalent payments on phantom stocks and thus we do not reach the question of whether the specific costs in question here are similar or related to dividend equivalents paid on phantom stock and thus should be treated in the same manner.

On the Merits

The Government disallowed the payment of dividends on restricted stock of Grumman in large part because dividends are paid out of profits or retained earnings and must be declared by the Board of Directors arguing that dividends are a return of capital to owners of the company, not a form of employee compensation. Further, DCAA found that:

> The dividend payment does not affect the earnings of Grumman Corporation on a consolidated basis. A compensation expense recorded at the segment level is eliminated against an "other income" account at the Corporate home office. Therefore, there is no cost to the company as a whole. If the Government were to allow recovery of the dividends, the contractor would be returning to equity an amount paid out to owners. Dividend payouts are considered transactions between the corporation and its owners, not between the corporation and its employees.

Grumman counters that these payments are not really dividends, because they are treated as ordinary income by the Internal Revenue Service and because the stock on which payments are made are not substantially vested in the employee recipients. Moreover, Grumman says, the accounting treatment at the GAC or segment level is relevant and GAC repays Grumman for the dividends paid to GAC's employees and records these repayments as a compensation cost.

We must first determine if the payment of dividends on restricted stock falls within the broad definition of compensation in 15-205.6. We find that it does. The payments are remuneration in a form which is not precluded, and, since during the period of restriction, the awardee must be an employee, we determine that the remuneration is for services rendered to the contractor during the period

of contract performance. If employment is terminated prior to removal of the restrictions, the employee forfeits the stock and thus relinquishes his or her right to receive dividends. In effect, during the period of restrictions, the right to receive dividends is contingent upon serving the company in the capacity of employee.

We must next determine if this particular type of compensation is allowable or unallowable per the principles. Our analysis must start with the cost principles themselves. First, we observe that 15-205 does not specifically cover dividends on restricted stock. The principles tell us that whenever a particular element of cost or a situation arising thereunder is not covered, we are to determine allowability "based on the principles and standards set forth in [Part XV] and, where appropriate, the treatment of similar or related selected items."

Dividends

Under the Federal Procurement Regulations (FPR) dividends of corporations and profits of partnerships and proprietorships were not allowable costs (FPR 1-15.205.14). The apparent rationale for disallowance of dividends and profits was that they "are not costs, but are, instead, distributions of earnings." Both the DAR, a version of which applies here, and the FAR, which succeeded it, are silent with regard to dividends. Authorities suggest, however, that dividends are not allowable because they are not contract costs. J. P. Bedingfield & L. I. Rosen, *Government Contract Accounting* 10-39 (1985). Rishe states that:

> Since dividend payments are not generally treated as expenses, but as distributions of profit, this cost principle [FPR 1-15.205-14] states the obvious. Although the DAR version of the *Cost Principles* does not contain a similar provision, the implications of FPR 1-15.205-14 apply equally under contracts subject to DAR.

> One problem regarding dividends is the difficulty sometimes encountered in determining whether a certain payment represents an unallowable dividend or distribution of profit, or, instead, is a form of compensation. If the payment is a form of compensation, it might be allowable under the cost principle for compensation costs . . . .

M. Rishe, *Government Contract Costs* 23-45 (1984)

Indeed, on at least two occasions we have held that compensation costs may be incurred even if it [sic] is paid from profits. In *General Dynamics*, ASBCA No. 3653, 58-1 BCA ¶ 1733, the appellant had instituted an incentive compensation plan which paid key employees additional compensation from the gross profits of the corporation. The Board observed:

> The principal objection urged by the Government against the plan is that the payments thereunder are not true compensation but are in fact a sharing of corporate profits and hence for some reason illegal or at least not compensable under the contract. From analysis of the plan we think it is obvious that the payments are compensation to the employees, substantially equivalent to bonuses, the extent of which is measured by the company's surplus gross profits as defined in Section VI of the plan, earlier quoted. If the Government had wished to forbid such a method of compensation it could have done so by contract. But it did not and we can see nothing illegal or objectionable in it per se so long as the payments meet the standard of reasonableness. We find that they do.

58-1 BCA at 6643

We followed *General Dynamics* in *Celesco Industries, Inc.*, ASBCA No. 20569, 77-1 BCA ¶ 12,445. Celesco

sought recovery of incentive bonus payments made to employees. The Government argued therein that these payments represented a distribution of profit and not compensation for services and as such were unallowable, citing *Blount Brothers Construction v. United States*, 180 Ct. Cl. 35 (1967). Appellant in *Celesco* countered with the argument that the payments were not profits but even if they were, they would be allowable, citing *General Dynamics, supra*, and two other cases. This Board was unpersuaded that incentive payments representing the distribution of profits were unallowable, relying upon and quoting from *General Dynamics* as above, and further stating:

> Almost 20 years have passed since our *General Dynamics* decision was issued. The Government has had ample opportunity to modify the cost reimbursement provisions of the Armed Services Procurement Regulation and/or otherwise to assure that contracts are drafted so as to preclude the possibility of situations similar to that present in this appeal from occurring. It has not done so. The Court and Board decisions cited by the Government are not applicable to the situation here. The appellant's employee incentive compensation plan and payments complied with the requirements set forth in ASPR 15-205.6(c) and, absent any limitations in the contract itself, the appellant was entitled to conclude that it would be reimbursed for payments made to its employees pursuant to that plan.

77-1 BCA at 60,283

Just as the contracts in *General Dynamics* and *Celesco* and the applicable cost principles did not preclude the recovery of incentive payments made from profits, the contract here at issue and the applicable cost principles do not preclude the recovery of profits. Since dividends are

paid out of retained earnings and retained earnings are nothing more than a residue of profits the same result must occur. Thus, if the dividend payments to appellant's employees on restricted stock otherwise meet the definition of compensation in DAR 15-205.6, and we have determined that they do, they are not precluded and are thus allowable costs. They are similar to cash or stock bonuses. See *The Boeing Company*, ASBCA No. 24089, 81-1 BCA ¶ 14,864, *aff'd.* on recon., 81-1 BCA ¶ 15,121.

Appellant is therefore entitled to recover the cost of dividends paid on restricted stock to its employees in accordance with the foregoing.

The appeal is granted to the extent stated.

Dated: 24 October 1989

/s/ Richard Shackleford
RICHARD SHACKLEFORD
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I *concur*

/s/ William J. Ruberry
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed
Services Board of Contract
Appeals

I *concur*

/s/ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed
Services Board of Contract
Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 34665, Appeal of Grumman Aerospace Corporation, rendered in conformance with the Board's Charter.

Dated: 3 NOV 1989

/s/ Donald D. Mills
for EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-1217

THE UNITED STATES,

Appellant,

v.

GRUMMAN AEROSPACE CORPORATION,

Appellee.

DECIDED: October 1, 1990

Before MARKEY, *Circuit Judge*, MILLER, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

MARKEY, *Circuit Judge*.

DECISION

The United States appeals from a decision of the Armed Services Board of Contract Appeals (Board), No. 34665, 90-1 BCA ¶ 22,417 (1989), requiring the United States to pay contract "costs" presented in Grumman Aerospace Corporation's (GAC) January 1987 claim. We *VACATE* the Board's decision because it lacked jurisdiction.

OPINION

Under 48 C.F.R. § 33.207(c)(2), a contractor claim must be certified by someone who (i) is "in charge at the contractor's plant or location involved" or (ii) has "overall responsibility for the conduct of the contractor's affairs." GAC's claim was certified only by Mr. Paladino. The Board's holding that he was qualified to certify a claim was not supported by substantial evidence.

Under subsection (i), Mr. Paladino was clearly not "in charge." He reported at least to Nat Busi, who "made the ultimate decision" to present the claim. Mr. Paladino "could not pursue the claim . . . without [Mr. Busi's] approval".

Under subsection (ii), Mr. Paladino's responsibility was not "overall" with respect to "the contractor's affairs". Responsibility limited to financial affairs is not enough. *Ball, Ball & Brosamer, Inc. v. the United States*, 878 F.2d 1426 (Fed. Cir. 1989). Ball's president stated that "Mr. Meek's job entails overall supervision and administration of all cost & claim aspects of the performance and completion of all of the contracts that this firm has at a given time." *Id.* at 1427. In similar language, Mr. Paladino declares "I have overall responsibility for the financial affairs . . . " GAC has not shown greater overall authority for Mr. Paladino than that possessed by Mr. Meek. GAC's reliance on *Triax* is unavailing. In that case, the signer and the president had "equal authority to direct any aspect of Triax's affairs." *Triax Co. v. United States*, 20 Cl. Ct. 507 (1990). As discussed above, Mr. Paladino did not have such overall authority.

APPENDIX D

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JAN 14 1991
FRANCIS X. GINDHART
CLERK

ORDER

Before MARKEY, Circuit Judge, MILLER, Senior Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on January 18, 1991.

FOR THE COURT,
/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

Dated: January 11, 1991

cc: PETER G. BARBER
GENE PERRY BOND
CYRUS E. PHILLIPS
JOHN G. DEGOOYER

US V GRUMMAN AEROSPACE CORP, 90-1217
(BCA—34665)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JAN 25 1991

FRANCIS X. GINDHART
CLERK

ORDER

The order denying the petition for rehearing filed on January 11, 1991, having been entered in error, the order is WITHDRAWN, and the mandate is RECALLED.

Dated: January 25, 1991

FOR THE COURT,

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

cc: PETER G. BARBER
GENE PERRY BOND
CYRUS E. PHILLIPS
JOHN G. DEGOOYER

US V GRUMMAN AEROSPACE CORP, 90-1217
(BCA - 34665)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

N O T I C E

Appeal No. 90-1217

The United States,

Appellant,

v.

Grumman Aerospace Corporation,

Appellee.

On January 30, 1991, one or more copies of an opinion in this appeal were inadvertently released to the public.

The opinion is of no effect. It has not been entered on the docket, and no revised judgment has been filed. The petition for rehearing and suggestion for rehearing in banc remain pending.

February 20, 1991

FILED
JUL 30 1991
OFFICE OF THE CLERK

No. 90-1800

In the Supreme Court of the United States

OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
PETER G. BARBER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES T. DELANOY
Senior Trial Attorney
Department of the Navy
Washington, D.C. 20360

MATHEW C. BLUM
Attorney
Executive Office of the President
Office of Management and Budget
Office of Federal Procurement Policy
Washington, D.C. 20503

QUESTIONS PRESENTED

1. Whether Federal Acquisition Regulation 33.207 (c)(2), 48 C.F.R. 33.207(c)(2), which describes the officials of a corporate government contractor who may certify claims for payment under the contract, is a valid implementation of the Contract Disputes Act, 41 U.S.C. 605(a), which provides that "the contractor shall certify" all claims exceeding $50,000.

2. Whether the contractor's failure to submit a properly certified claim for payment to the contracting officer deprived the contracting officer of jurisdiction to act upon the claim and deprived the Armed Services Board of Contract Appeals of jurisdiction to review the contracting officer's decision.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Ball, Ball & Brosamer, Inc. v. *United States*, 878 F.2d 1426 (Fed. Cir. 1989)	7, 11
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	6, 10
Erickson Air Crane Co. of Washington, Inc. v. *United States*, 731 F.2d 810 (Fed. Cir. 1984)	11
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976)	9
Irwin v. *Veterans Administration*, 111 S. Ct. 453 (1990)	12
Sigmon Fuel Co. v. *Tennessee Valley Auth.*, 754 F.2d 162 (6th Cir. 1985)	11
Theon v. *United States*, 765 F.2d 1110 (Fed. Cir. 1985)	11
Travelers Indemnity Co. v. *United States*, 16 Cl. Ct. 142 (1988)	10
United States v. *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996 (Fed. Cir. 1991)	8, 11
W.M. Schlosser Co. v. *United States*, 705 F.2d 1336 (Fed. Cir. 1983)	11
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982)	12

Statutes and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:	
42 U.S.C. 2000e-5(e)	11
42 U.S.C. 2000e-16(c)	11

Statutes and regulations—Continued: Page

Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* 8
41 U.S.C. 604 7
41 U.S.C. 605(a) 8
41 U.S.C. 605(c)(1) 2, 5
41 U.S.C. 606 8
41 U.S.C. 607(g) 5, 8
41 U.S.C. 607(g)(2) 5
41 N.S.C. 607(h) 9
41 U.S.C. 609(a) 8
Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 797 8
41 U.S.C. 401 *et seq.* 8
41 U.S.C. 403(7) 7
41 U.S.C. 405(a) 9, 10
10 U.S.C. ch. 137 (§§ 2301 *et seq.*) 10
10 U.S.C. 2302(3) 7
10 U.S.C. 2305(b)(3) 7
18 U.S.C. 287 7
18 U.S.C. 1001 7
28 U.S.C. 1295 8
31 U.S.C. 3729 7
40 U.S.C. 486(c) 10
42 U.S.C. 2473(c) 10
42 U.S.C. 2473(c)(1) 10
48 C.F.R.:
Pt. 9:
Section 9.406-2 7
Pt. 33:
Section 33.201 11
Section 33.207 ..... 3, 7
Section 33.207(c)(2) 3, 5, 6, 7
Section 33.207(c)(2)(i) 3, 4, 6
Section 33.207(c)(2)(ii) 3, 4, 6

Miscellaneous:
124 Cong. Rec. 36,266 (1978) 9
44 Fed. Reg. (1979):
p. 5218 9
p. 5224 9

Miscellaneous—Continued: Page

45 Fed. Reg. (1980):
p. 31,035 9
pp. 31,036-31,037 9
48 Fed. Reg. (1983:
p. 42,101 9
p. 42,348 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1800

GRUMMAN AEROSPACE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals on rehearing (Pet. App. 1a-17a) is reported at 927 F.2d 575. The initial decision of the court of appeals (Pet. App. 40a-41a) is noted at 918 F.2d 185 (Table). The decision of the Armed Services Board of Contract Appeals (Pet. App. 18a-39a) is reported at 90-1 B.C.A. (CCH) ¶ 22,417.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1991. The petition for a writ of certiorari was filed on May 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Petitioner, a government contractor, sought reimbursement under its cost reimbursable contracts for dividends paid to its employees. The dividends were paid on restricted shares of the stock of petitioner's parent, Grumman Corporation, under Grumman's Restricted Stock Award Plan.[1] The Defense Contract Audit Agency disapproved reimbursement of these dividend payments under 43 of petitioner's contracts. Pet. App. 2a.

Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 605(c)(1), petitioner then submitted an uncertified claim to the Navy's contracting officer for $48,707. C.A. Paladino, petitioner's senior vice president and treasurer, later purported to certify the claim.[2] The contracting officer denied the claim, holding that the dividends were not compensation for services rendered under the contracts. Pet. App. 2a-3a, 19a-20a.

Petitioner then appealed to the Armed Services Board of Contract Appeals (ASBCA or Board), which held that the dividends were recoverable costs under petitioner's contracts. Pet. App. 18a-39a. In

---

[1] Recipients of the restricted stock cannot sell or transfer it for a specified period, usually five years. If a recipient leaves the employment of Grumman and its subsidiaries during this period, the restricted stock is forfeited, subject to specified exceptions. As long as the recipient holds the stock, however, he has the same right as other shareholders to vote the shares and to receive dividends declared by Grumman's board of directors. Pet. App. 21a-23a.

[2] Only claims exceeding $50,000 must be certified pursuant to 41 U.S.C. 605(c)(1). Although its initial claim was just under the amount, petitioner acknowledges that "[t]he dispute implicated * * * several hundred thousand dollars per year" (Pet. 6), and does not argue that its claim did not need to be certified.

addition to arguing that the costs were not recoverable, the government had moved to dismiss the appeal on the ground that Paladino was not a proper official to certify petitioner's claim under Federal Acquisition Regulation (FAR) 33.207(c)(2), 48 C.F.R. 33.207. That regulation requires claims made by corporate contractors to be certified by "[a] senior company official in charge at the contractor's plant or location involved" or by "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." 48 C.F.R. 33.207(c)(2)(i) and (ii). In denying the motion to dismiss, the Board held that Paladino was a proper official to make the certification, based upon its findings that "[a]t the time of certification, [his] functions included overall responsibility for [petitioner's] financial affairs" and he "report[ed] directly to the President of [petitioner]." Pet. App. 20a, 21a, 33a.

On the government's appeal, the Federal Circuit vacated and remanded the Board's decision with directions to dismiss for lack of jurisdiction. Pet. App. 1a-11a. The court of appeals first held (*id.* at 4a) that the certification regulation validly implements the Contract Disputes Act of 1978, which requires that "the contractor shall certify" claims exceeding $50,000. 41 U.S.C. 605(c)(1). The court also held that "[t]he regulation is clearly within the congressionally delegated authority of the Office of Federal Procurement Policy 'to issue guidelines with respect to criteria for the . . . functions . . . of the agency boards . . .' that 'may be necessary or desirable to carry out the provisions of this chapter . . . .' 41 U.S.C. § 607(h) (1988)." Pet. App. 5a. Relying upon its past precedents, the court further held that "the certification requirement is a jurisdictional pre-

requisite" to the appeal of a contracting officer's decision. *Id.* at 7a.

The court held that Paladino was not a proper official to certify petitioner's claim because he was neither "[a] senior company official in charge at the contractor's plant or location involved" nor "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." Pet. App. 9a, quoting 48 C.F.R. 33.207 (c)(2)(i) and (ii). Paladino, the court found, failed to satisfy the first test because, although he was a "senior official," he was not "in charge" since he could not pursue the claim without the approval of another official. *Ibid.* The alternative test was not met, the court found, because petitioner "ha[d] not met its burden of establishing that Mr. Paladino had the overall responsibility for the conduct of [the] affairs required by the regulation." Pet. App. 10a.

Finally, the court noted that petitioner was not without a remedy. Pet. App. 11a. It observed that at any time over the past three years, petitioner could have submitted a properly certified claim. *Ibid.* The court added that petitioner could still submit a properly certified claim to the contracting officer, and if denied relief could appeal either to the Board or the Claims Court. *Ibid.*

Four judges of the court of appeals dissented from the court's refusal to rehear the case en banc. In their view, the certification regulation is invalid because "[t]he statute delegates *to the contractor* the power to designate who speaks for it." Pet. App. 15a. Furthermore, the dissenters stated that, notwithstanding the Federal Circuit's longstanding precedents to the contrary, the failure to certify a claim properly should not be held to be a jurisdictional de-

fect, but rather a failure to state a claim for relief. *Id.* at 16a-17a.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, with one narrow exception, Congress has conferred exclusive jurisdiction upon the Federal Circuit to review disputes under the Contract Disputes Act of 1978, 41 U.S.C. 607(g),[3] thereby establishing it as the specialized and expert tribunal to resolve issues of the kind presented here. Further review of this case is therefore not warranted.

1. a. The court of appeals correctly held that the certification regulation, FAR 33.207(c)(2), validly implements the Contract Disputes Act of 1978. The Act provides:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C. 605(c)(1).

The implementing regulation, FAR 33.207(c)(2), provides:

> If the contractor is not an individual, the certification shall be executed by—
>
> > (i) A senior company official in charge at the contractor's plant or location involved; or

---

[3] The sole exception is that decisions of the TVA Board of Contract Appeals are reviewable in district court. 41 U.S.C. 607(g)(2).

> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

48 C.F.R. 33.207(c)(2).

Petitioner (Pet. 15-16, 18) and the dissenting judges below (Pet. App. 14a-15a) maintain that because the Act provides only that "the contractor" shall certify claims, it follows that the contractor is free to designate whomever it wants to make the certification and that the regulation is an invalid restriction on that right. The Federal Circuit correctly rejected that argument.

As the court below recognized (Pet. App. 4a-5a), the statute is silent on the question of who may certify a claim for a corporate contractor. The court properly applied *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in holding that this silence does not preclude agency regulation, but rather "leaves a gap" that the agency can fill so long as its regulation is not "arbitrary, capricious, or manifestly contrary to the statute." Pet. App. 5a, quoting *Chevron*, 467 U.S. at 843-844.[4]

---

[4] Petitioner also contends that, even if the regulation is valid, the Federal Circuit's construction of it is unduly restrictive. Pet. 13-15. The court below, however, was manifestly correct in holding that Paladino does not meet either test of FAR 33.207(c)(2). Petitioner does not contest the court's holding that Paladino fails the first test because he was not "in charge at the contractor's plant or location involved." 48 C.F.R. 33.207(c)(2)(i). Petitioner does contend (Pet. 15) that Paladino meets the second test, *i.e.*, that he is "[a]n officer * * * having overall responsibility for the conduct of the contractor's affairs." 48 C.F.R. 33.207(c)(2)(ii). Petitioner's own controller testified, however, that he, not Paladino, "made the ultimate decision to present the claim" and that Paladino, his subordinate, could not pursue

The certification regulation and the Federal Circuit's application of it in this case are consistent with the importance of certification under the Contract Disputes Act of 1978. Submission of fraudulent claims subjects a contractor to possible forfeiture of the claim (41 U.S.C. 604), civil monetary sanctions (31 U.S.C. 3729), debarment (see 10 U.S.C. 2302(3), 2305(b)(3); 41 U.S.C. 403(7); 48 C.F.R. 9.406-2)), and imprisonment (18 U.S.C. 287, 1001). In view of these serious consequences, the certification regulation appropriately requires that a high-level official within a corporate contractor execute the certification.

The Federal Circuit's holding is also consistent with that court's past precedents, which provide guidance to contractors as to who must certify claims. In *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426 (1989), for example, the Federal Circuit held that a contractor's chief cost engineer could not certify claims for more than $50,000 because he did not satisfy either test of FAR 33.207. In that case, the court specifically rejected the argument, repeated by petitioner in this case, that any officer authorized by the contractor to certify claims on its behalf can execute a valid certification for purposes of the Contract Disputes Act of 1978. 878 F.2d at 1428.[5]

---

the claim without his approval. Pet. App. 9a. This testimony, which petitioner does not address, is fatal to petitioner's argument that Paladino met either test of Far 33.207 (c)(2). In any event, whether Paladino has "overall responsibility for the conduct of [petitioner's] affairs" is not a question warranting review by this Court.

[5] Petitioner argues (Pet. 13-15, 17-18) that the court's interpretation of FAR 33.207(c)(2) means that only *the* plant manager or only *the* chief executive officer of a corpor-

b. Petitioner also argues (Pet. 19-22) that the Office of Federal Procurement Policy (OFPP) lacked authority to issue the certification regulation and, in any event, that the OFPP's construction of the Contract Disputes Act of 1978 is not entitled to deference. These arguments lack merit.

The OFPP was established in 1974 as part of the Office of Management and Budget by the Office of Federal Procurement Policy Act, 41 U.S.C. 401 *et seq.* The Act authorized the Administrator of the OFPP to prescribe procurement regulations and procedures that are binding upon Executive agencies. Pub. L. No. 93-400, 88 Stat. 797. The Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, was enacted four years later. It establishes a uniform contract claims procedure by providing that contractors shall submit all claims in writing to a contracting officer. 41 U.S.C. 605(a). A contractor can appeal the decision of the contracting officer either to an agency board of contract appeals (41 U.S.C. 606) or to the Claims Court (41 U.S.C. 609(a)). Either the contractor or the government can then appeal the decision of the board of contract appeals or the Claims Court to the Federal Circuit. 41 U.S.C. 607 (g); 28 U.S.C. 1295.

The Contract Disputes Act of 1978 authorizes the OFPP "as may be necessary or desirable to carry out the provisions of [the Act], to issue guidelines with respect to criteria for the establishment, functions,

---

ation can certify a claim. The court below dismissed this argument as a "gross[] exaggerat[ion]" of its holding. Pet. App. 10a. In a subsequent case, the court held that the executive vice president of a corporate contractor had the necessary overall responsibility. *United States* v. *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996 (Fed. Cir. 1991).

and procedures of the agency boards (except for [the TVA] board)." 41 U.S.C. 607(h). As petitioner notes (Pet. 20-21), "guidelines" was substituted for "rules and regulations" by an amendment on the Senate floor. See 124 Cong. Rec. 36,266 (1978). While guidelines lack the binding effect of legislative rules, they are nonetheless entitled to deference as the agency's interpretation of the statutory certification requirement. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). The Federal Circuit properly upheld the certification regulation under the OFPP's authority to issue guidelines.

The OFPP, however, has been given additional power to issue regulations that provides more direct authority for the certification regulation. The OFPP Administrator is authorized "to promulgate a single, simplified, uniform Federal procurement regulation." 41 U.S.C. 405(a). Following notice and comment (44 Fed. Reg. 5218, 5224 (1979)), OFPP issued Policy Letter 80-3, which requires Executive agencies to amend their procurement regulations to include, among other provisions, the claims-certification requirement. 45 Fed. Reg. 31,035, 31,036-31,037 (1980).

The Federal Acquisition Regulation, including the claims-certification regulation, was then issued in 1983 jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration. 48 Fed. Reg. 42,101, 42,348 (1983). The claims-certification regulation is therefore independently supported by those officials' own statutory authorizations to issue procurement regulations.[6] The

---

[6] Part 33 of 48 C.F.R., which includes the relevant regulation, states that it was issued under the authority of 40

regulation, therefore, has ample statutory support and is entitled to deference under *Chevron*.[7]

2. Petitioner also argues (Pet. 22-27) that the Federal Circuit erred by treating the failure to file a properly certified claim as a jurisdictional defect. Regardless of whether that defect was jurisdictional or, as the dissent below would have held (Pet. App. 16a-17a), merely a failure to state a claim for which relief can be granted, petitioner can and must refile its claim, properly certified, to recover.[8] To be sure, jurisdictional arguments can be raised at any time in the proceedings, while merits arguments are waived if not timely raised. In this case, however, the government moved for dismissal of the appeal on the basis of the faulty certification, and the Board considered that motion on its merits rather than reject-

---

U.S.C. 486(c), 10 U.S.C. ch. 137, and 42 U.S.C. 2473(c). The first of those statutes gives the Administrator of GSA broad authority to "prescribe such regulations as he deems necessary to effectuate his functions under" the Federal Property and Administrative Services Act of 1949. Chapter 137 of 10 U.S.C. governs procurement by the Department of Defense and hence governs petitioner's contracts. NASA's Administrator is authorized to issue "regulations governing the manner of [NASA's] operations and the exercise of the powers vested in it by law." 42 U.S.C. 2473(c)(1).

[7] In its present form, the OFPP Act expressly authorizes the OFPP Administrator to "prescribe Government-wide procurement policies," which "shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation." 41 U.S.C. 405(a).

[8] Petitioner can refile its claim because no statute of limitations restricts the time for a contractor to present a claim to the contracting officer under the Contract Disputes Act of 1978, although the doctrine of laches is applicable. *Travelers Indemnity Co.* v. *United States*, 16 Cl. Ct. 142, 151-152, 154-158 (1988).

ing it as untimely. Pet. App. 33a.[9] The disagreement between the majority and dissent below, therefore, did not affect the outcome of this case.

In any event, the Federal Circuit has consistently and correctly held that proper certification is a jurisdictional prerequisite to bringing a claim.[10] The Contract Disputes Act of 1978 is a waiver of sovereign immunity. *Sigmon Fuel Co.* v. *Tennessee Valley Auth.*, 754 F.2d 162, 165 (6th Cir. 1985); *Erickson Air Crane Co. of Washington, Inc.* v. *United States*, 731 F.2d 810, 813 (Fed. Cir. 1984). The Federal Circuit has correctly reasoned that neither the contracting officer nor the Board has the power to waive the claims-certification requirement that Congress has imposed, and that the contracting officer lacks authority, *i.e.*, jurisdiction, to issue a decision in the absence of the necessary certification. *W.M. Schlosser Co.* v. *United States*, 705 F.2d 1336, 1338 (1983). See 48 C.F.R. 33.201.

Contrary to petitioner's contention (Pet. 23-24), the claims-certification requirement need not be treated the same as the time limitations in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (e), 2000e-16(c), which this Court held are not ju-

---

[9] Petitioner contends (Pet. 27) that the government first raised the jurisdictional argument in its post-hearing brief to the Board. But the first entry in the "statement of principal issues" in the government's pre-hearing brief was "[w]hether or not Grumman's claim was properly certified" (at 9); as noted, the Board apparently concluded that the government had raised the issue in timely fashion.

[10] *E.g.*, *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d at 999; *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *Theon* v. *United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985); *W.M. Schlosser Co.* v. *United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983).

risdictional. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). Moreover, those cases held that the time limits were subject to equitable tolling so that suit could proceed on the plaintiffs' otherwise proper, but untimely, administrative charge or judicial complaint. In the present case, however, petitioner has not as yet filed a proper claim, so the doctrine of equitable tolling is of no use to it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
PETER G. BARBER
Attorneys

JAMES T. DELANOY
Senior Trial Attorney
Department of the Navy

MATHEW C. BLUM
Attorney
Executive Office of the President
Office of Management and Budget
Office of Federal Procurement Policy

JULY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20655

(3)

No. 90-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

STUART B. NIBLEY
Counsel of Record
MICHAEL B. HUBBARD
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for the Amicus Curiae National Security Industrial Association

June 21, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	
I. THE CONTRACT DISPUTES ACT'S CLAIM CERTIFICATION REQUIREMENT DOES NOT RELATE IN ANY WAY TO THE JURISDICTION OF THE FEDERAL AGENCY BOARDS OF CONTRACT APPEALS OR THE UNITED STATES CLAIMS COURT	4
A. Section 605(c)(1) Of The Contract Disputes Act Does Not Establish Jurisdictional Prerequisites For The Review Of A Contracting Officer's Decision	4
B. Congress Addressed The Subject Matter Jurisdiction Of The Boards And The United States Claims Court In §§ 607 And 609 Of The CDA And § 1491 Of The Tucker Act	5
C. The Decision Below Relies On Earlier Decisions From The Court Of Claims And The Federal Circuit But Does Not Analyze The Reasoning In Those Decisions	7
D. In 1989 The Federal Circuit Compounded The Impact Of Its Jurisdictional Rulings In A Decision That Relied On An Interpretative Regulation To Determine Whether A Board Possessed Subject Matter Jurisdiction	10
II. THE REGULATION THAT PURPORTS BOTH TO INTERPRET AND TO IMPLEMENT THE CDA'S CERTIFICATION REQUIREMENT IS INCONSISTENT WITH THE STATUTE'S CLEAR INTENT	11
A. The Certification Requirement Embodied In § 605(c)(1) Of The CDA Provides Clear Direction And Does Not Require Regulatory Interpretation	11

TABLE OF CONTENTS—Continued

Page

B. In Contrast To The CDA, The 1979 DoD Authorization Act Explicitly Identifies A Limited Category Of Individuals Who Are Authorized To Certify Contractor Claims In Excess Of $100,000 13

C. Even If The Issuance Of An Interpretative Guideline To § 605(c)(1) Of The CDA Was Appropriate, The OFPP's Interpretation In This Instance Is Not Entitled To Deference.. 14

D. The CDA's Certification Requirements Have Not Changed Since The Statute's Enactment In 1978 16

III. THE PANEL'S INTERPRETATION OF FAR § 33.207(c)(2)'S REQUIREMENTS IS ERRONEOUS 17

A. FAR § 33.207(c)(2)(i) Does Not Require That A Certifying Senior Company Official Be Physically Located At The Contractor's Plant 17

B. Contrary To The Holding In The Decision Below, FAR § 33.207(c)(2)(ii) Contemplates That A Number Of Officers Within A Contractor's Organization May Possess Overall Responsibility For A Contractor's Affairs 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426 (Fed. Cir. 1989) 10, 11
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 8
Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988) 13
Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989) 5, 9
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 12, 13
Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983) 9
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) .. 14
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 13, 15
Little River Lumber Co. v. United States, 21 Cl. Ct. 527 (1990) 11, 12
Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981) 8
Paul E. Lehman, Inc. v. United States, 673 F.2d 352 (Ct. Cl. 1982) 8, 9
Skelly & Loy v. United States, 685 F.2d 414 (Ct. Cl. 1982) 9
Thoen v. United States, 765 F.2d 1110 (Fed. Cir. 1985) 9
W. H. Moseley Co., Inc. v. United States, 677 F.2d 850 (Ct. Cl.), *cert. denied*, 459 U.S. 836 (1982) .. 9
W.M. Schlosser Co. v. United States, 705 F.2d 1336 (Fed. Cir. 1983) 9
Watt v. Alaska, 451 U.S. 259 (1981) 15
Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226 (10th Cir. 1987) 5
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 5, 6, 7

STATUTES

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*... 6, 7
Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
41 U.S.C. § 601(4)	11
41 U.S.C. § 605(c)(1)	*passim*
41 U.S.C. § 607(d)	5, 6
41 U.S.C. § 607(h)	14
41 U.S.C. § 609	5, 6
Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611 (1978)	13, 14
Tucker Act, 28 U.S.C. § 1491	5, 6
28 U.S.C. § 1491(a)(2)	3, 6
REGULATIONS	
32 C.F.R. § 1-314	15
48 C.F.R. § 33.207(c)(2)	*passim*
48 C.F.R. § 33.207(c)(2)(i)	17, 18
48 C.F.R. § 33.207(c)(2)(ii)	18
41 C.F.R. § 1-1.318	15
OTHER AUTHORITIES	
55 Fed. Cont. Rep. (BNA) 369 (March 25, 1991)	2
55 Fed. Cont. Rep. (BNA) 106 (Jan. 28, 1991)	2
Fed. R. Civ. P. 12(b)(6)	5
Fed. R. Civ. P. 12(h)(2)	5
44 Fed. Reg. 5,224 (1979)	15
44 Fed. Reg. 12,524 (1979)	16
44 Fed. Reg. 34,229 (1979)	16
45 Fed. Reg. 31,035 (1980)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1800

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the consent of the parties,[1] the National Security Industrial Association ("NSIA") respectfully submits this brief *amicus curiae* in support of Grumman Aerospace Corporation's ("Grumman") petition. NSIA is a national organization of some 400 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the United States' national security needs. NSIA's membership includes most of the American manufacturing companies on the Department of Defense's annual list of contractors who receive the largest volume of awards. In

---

[1] The consent letters of both counsel have been filed with the Clerk of the Court.

addition, NSIA's membership includes many small and medium-sized companies that provide goods and services to the federal Government. One of NSIA's most important functions is the presentation of views of its members on Government procurement issues. The case before the Court involves an important Government procurement issue that is of direct and immediate interest to NSIA.

The case at bar has the potential to affect virtually every member of NSIA. Indeed, the decision below [2] is already having an impact on NSIA's membership in a very tangible way as the boards of contract appeals react to the decision. The Armed Services Board of Contract Appeals ("ASBCA"), for example, "is reviewing its pending cases to identify those in which the certification may present a possible problem" as a result of the Federal Circuit's decision below. 55 Fed. Cont. Rep. (BNA) 369-70 (March 25, 1991).

> [ASBCA Chairman] Williams stressed that the board must continue to resolve appeals, despite the uncertainties attendant on the Federal Circuit's opinion and the contractor's request for review by the U.S. Supreme Court. Because a proper certification is a jurisdictional prerequisite to board action, if a certificate is defective, any decision rendered by the board on that claim will be a nullity. Williams indicated that contractors are being contacted in an effort to keep the board from 'spinning its wheels' and issuing 'decisions that have no weight.'

Id. at 370. As of October 1, 1990 the ASBCA's active docket reflected 2,462 pending appeals.[3]

---

[2] The decision below appears in Petitioner's Appendix A and is reported at 927 F.2d 575.

[3] Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals For the Fiscal Year Ending 30 September 1990, *reprinted in* 55 Fed. Cont. Rep. (BNA) 106 (Jan. 28, 1991). In addition to the ASBCA, there are *eleven* other agency

The decision below thrusts the status of an untold number of pending and potential claims into question. Contractors, Government agencies, the boards of contract appeals and the Claims Court must now examine not only the status of every claim exceeding $50,000 that is the subject of a pending appeal or suit before a board or the Claims Court, but also: (1) every claim that might in the future be submitted to a Government contracting officer for appeal; (2) every claim that has already been submitted to a Government contracting officer but has not yet been appealed; and (3) every claim that has already been fully adjudicated in a board appeal or Claims Court suit where the appeal rights have not yet run. The Government contracting community is totally confounded as to how to proceed with the certification and administration of future claims and disputes, which, in the aggregate, could involve billions of dollars.

If the decision below is permitted to stand, the taxpayer will also be called upon to pick up substantial costs of wasted judicial and litigation effort. Claims that have already been litigated, or partially litigated, will be relitigated. In addition, hundreds if not thousands of motions will be argued regarding the certification issue.

The problem is compounded by the fact that the Federal Circuit itself evidences a very profound split on virtually every issue in the decision. At least four judges from the Federal Circuit believe that: (1) claims certification is not a jurisdictional prerequisite to the power of any agency board of contract appeals or the United States Claims Court to review a Government contracting officer's decision on a claim submitted under the Contract Disputes Act of 1978; (2) the regulation that purports to interpret § 605(c)(1) of the Contract Disputes Act of 1978 is not entitled to judicial deference; and

---

boards of contract appeals. The United States Claims Court is also vested with jurisdiction to hear appeals under the Contract Disputes Act. 28 U.S.C. § 1491(a)(2).

(3) in any case, the decision below misconstrued the regulation.

NSIA is concerned because of the pervasive impact that the decision below is having on the Government contracting community. NSIA respectfully submits this brief *amicus curiae* and urges the Court to grant Grumman's petition for *certiorari*.

ARGUMENT

I. THE CONTRACT DISPUTES ACT'S CLAIM CERTIFICATION REQUIREMENT DOES NOT RELATE IN ANY WAY TO THE JURISDICTION OF THE FEDERAL AGENCY BOARDS OF CONTRACT APPEALS OR THE UNITED STATES CLAIMS COURT

A. Section 605(c)(1) Of The Contract Disputes Act Does Not Establish Jurisdictional Prerequisites For The Review Of A Contracting Officer's Decision

The decision below advances the erroneous view that a contractor's proper certification of a claim submitted under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 ("CDA"), is a jurisdictional prerequisite for a subsequent appeal or suit challenging a contracting officers' decision on the claim. The CDA's claim certification requirement appears in § 605(c)(1), which provides in pertinent part:

> A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. *For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.*

41 U.S.C. § 605(c)(1) (emphasis added).

There is absolutely no indication, either in the plain language of § 605(c)(1), or in its legislative history, that a contractor's obligation to certify the accuracy of a claim exceeding $50,000 is a jurisdictional prerequisite to review of a contracting officer's decision at the Claims Court or at an agency board of contract appeals. Rather, an uncertified or improperly certified claim is the conceptual equivalent of a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).[4] As the dissent below states:

> [F]ailure to properly certify a claim under the CDA does not speak to subject matter jurisdiction—it merely means that the particular claimant has failed to state a claim for which, under the terms of the statute, relief may be granted.

Pet. App. A at 17a. Because the certification requirement is not jurisdictional, it is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Thus, the decision below erred in ordering the dismissal of Grumman's appeal after the appeal had been fully litigated at the ASBCA.[5]

B. Congress Addressed The Subject Matter Jurisdiction Of The Boards And The United States Claims Court In §§ 607 And 609 Of The CDA And § 1491 Of The Tucker Act

Section 607(d) of the CDA addresses the authority of agency boards of contract appeals to consider contractor appeals from contracting officers' decisions:

---

[4] Once there is a decision on the merits, it is too late to raise a "failure to state a claim" defense. *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 359 (1st Cir. 1989) (defendant waived its right to raise issue by bringing it after trial on the merits); *Weatherhead v. Globe Int'l., Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) (motion to dismiss for failure to state a claim waived if not raised until after trial); Fed. R. Civ. P. 12(h)(2).

[5] The ASBCA ruled in Grumman's favor on the merits of its claim. Pet. App. B, *Grumman Aerospace Corp.*, ASBCA No. 34665, 90-1 B.C.A. (CCH) ¶ 22,417 (Oct. 24, 1989).

> Each agency board shall have *jurisdiction* to decide *any appeal from a decision of a contracting officer* (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal.

41 U.S.C. § 607(d) (emphasis added).

The Tucker Act, 28 U.S.C. § 1491, establishes the jurisdiction of the Claims Court to review contractor appeals of contracting officer decisions pursuant to the CDA: "[t]he Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978." 28 U.S.C. § 1491(a)(2). Section 10(a)(1) of the CDA is codified at 41 U.S.C. § 609 and provides as follows:

> (1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to a agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

41 U.S.C. § 609.

There is absolutely no language in any of these statutory provisions to indicate that the CDA's claim certification requirement was intended to limit the statutorily established authority of agency boards of contract appeals or the Claims Court to review final contracting officer decisions under the CDA. Indeed, 28 U.S.C. § 1491 (a)(2) makes clear that the Claims Court has jurisdiction to render a judgment on *any claim* filed by a contractor under the CDA.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 385, this Court considered whether a statutory time limit in the Civil Rights Act of 1964, 42 U.S.C. § 2000e,

et seq., for filing a discrimination claim with the Equal Employment Opportunity Commission ("EEOC") was a jurisdictional prerequisite to a claimant's right to file suit in federal court. The Court concluded that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (footnotes omitted).

The Court in *Zipes* found it significant that the section of the statute which set forth the time limitations for filing charges with EEOC was *separate* from the section that established the district courts' jurisdiction to consider claims under the statute. The Court also found it significant that the statute's timeliness requirements did not speak in jurisdictional terms. "The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it *does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.*" *Id.* at 394 (emphasis added). Like the statutory provision construed in *Zipes*, § 605(c)(1) of the CDA nowhere "speaks in jurisdictional terms" or even refers to the jurisdiction of the boards of contract appeals or the Claims Court.

We respectfully submit that the CDA's claim certification requirement is not a jurisdictional prerequisite to the review of a contracting officer's decision by the Claims Court or an agency board of contract appeals.

C. The Decision Below Relies On Earlier Decisions From The Court Of Claims And The Federal Circuit But Does Not Analyze The Reasoning In Those Decisions

The decision below offers that it is "well settled" that the CDA's certification requirement is a jurisdictional prerequisite to the right of a board of contract appeals or the Claims Court to consider an appeal from a contract-

ing officer's decision on a contractor's claim. Pet. App. A at 7a. The decision provides absolutely no discussion as to why it so concludes. A close reading of the prior decisions upon which the panel relies reveals their similar lack of analysis. For the most part, the cases that have considered the jurisdictional issue simply cite to earlier decisions with little or no analysis of their own.

The notion that the proper certification of a claim has jurisdictional consequences began with *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct. Cl. 1982).[6] In *Lehman*, the Court of Claims held that "[u]nless a claim has been properly certified, it cannot be considered under the statute" and "unless that requirement is met, *there is simply no claim that this court may review under the Act.*" *Id.* at 355 (emphasis added). The *Lehman* decision never discussed the issue of jurisdiction. Indeed, the court's reasoning implies that a contractor's failure to submit a properly certified claim presents a board of contract appeals or the Claims Court with a claim upon which relief cannot be granted.

The practical distinction between an absence of subject matter jurisdiction and a party's failure to state a claim is that the former simply cannot be waived, at any stage of the proceeding, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986), while the latter can. A litigant waives the right to raise a defense of "failure to state a claim" after a court has considered a matter on

---

[6] The Court of Claims also briefly discussed the "jurisdiction" purportedly conferred by the CDA's certification requirements in an earlier case, *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981). In *Paragon*, however, the issue was whether the contractor had submitted any claim at all. In *dicta*, the court said, "Absent this 'claim,' no 'decision' is possible—and, hence, no basis for jurisdiction in this court." *Id.* at 971. The court ultimately concluded that a proper claim had been submitted. It is of interest that in that case the court determined that a mere letter from Paragon's attorney to the contracting officer, setting out Paragon's claim, met the CDA's claim requirements.

its merits. *Brown v. Trustees of Boston Univ.*, 891 F.2d at 337.

Within two months after the Court of Claims' decision in *Lehman*, it issued another decision that again addressed the issue of the sufficiency of a contractor's certification of a claim submitted under the CDA. *W.H. Moseley Co., Inc. v. United States*, 677 F.2d 850 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 836 (1982). *W.H. Moseley* cited *Lehman* for the proposition that proper certification of a claim over $50,000 is a jurisdictional prerequisite to the Claims Court's review of a contracting officer's decision regarding the claim. *W.H. Moseley* also held that the Government's earlier failure to raise a jurisdictional defense could not be the subject of estoppel or waiver despite the contracting officer's issuance of a final decision on the contractor's uncertified claim. *Id.* at 852.

Thereafter, the decisions from the Court of Claims and, later, from the Federal Circuit typically cite *Lehman* and *W.H. Moseley* as being dispositive of the jurisdictional issue.[7] In *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985), the Federal Circuit went a step further. Without any citation to specific language in the statute or legislative history, the court stated that "Congress has determined that submission of a certified claim to the contracting officer in the first instance is a jurisdictional prerequsite to filing a suit in the Claims Court." *Id.* at 1116. Following *W.H. Moseley*, the cases that have considered the jurisdictional issue, have simply fallen in line on the issue, without further analysis.

---

[7] *See, e.g., Skelly & Loy v. United States*, 685 F.2d 414, 417 (Ct. Cl. 1982) ("It is clear from a reading of the statute and prior decisions of this court that we have no jurisdiction, under the CDA, to entertain an uncertified claim for over $50,000."); *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983); ("[T]he certification requirement is jurisdictional . . ."); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1337 (Fed. Cir. 1983) ("[W]e have no jurisdiction because the claim the appellant submitted to the contracting officer was not certified.").

D. In 1989 The Federal Circuit Compounded The Impact Of Its Jurisdictional Rulings In A Decision That Relied On An Interpretative Regulation To Determine Whether A Board Possessed Subject Matter Jurisdiction

Prior to 1989, none of the Federal Circuit's reported decisions that dealt with claims certification had ever focused on the identity of the individual certifying on behalf of a contractor. Rather, these decisions focused on the language of the certification provided or whether certification had been provided at all. However, in *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir. 1989), the court extended its jurisdictional analysis by looking away from the governing language in the CDA and towards a provision in the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 33.207(c)(2).

That regulation, first promulgated by the Office of Federal Procurement Policy ("OFPP") in 1980, purports to interpret § 605(c)(1) of the CDA. The regulation provides:

> (2) If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

The regulation's certification requirements are clearly more restrictive than those included at § 605(c)(1) of the CDA. The CDA's certification requirement merely states that contractors must certify all claims over $50,000, while the regulation substantially limits the number of contractor representatives who are eligible to certify on behalf of the contractor.[8]

---

[8] The regulatory history of FAR § 33.207(c)(2) and its legal effect with regard to the requirements of § 605(c)(1) of the CDA are discussed in II, *infra*.

Thus, in *Ball, Ball & Brosamer*, the court affirmed the Interior Board of Contract Appeals' dismissal of a contractor's appeal from a contracting officer's final decision for lack of subject matter jurisdiction. The basis for the board's decision was that the individual who had certified the contractor's claim, the contractor's project manager, was not qualified to certify on behalf of the contractor under the criteria set out in FAR § 33.207(c)(2).

The decision below held that the certification by Grumman's senior vice president and treasurer did not meet the requirements of FAR § 33.207(c)(2), and therefore did not meet the CDA's certification requirements. Therefore, the court directed the ASBCA to dismiss Grumman's appeal. In essence, both *Ball, Ball & Brosamer* and the decision below have allowed OFPP to establish the jurisdictional boundaries, not only of the boards, but of the Claims Court as well. This is clearly inappropriate.

II. THE REGULATION THAT PURPORTS BOTH TO INTERPRET AND TO IMPLEMENT THE CDA'S CERTIFICATION REQUIREMENT IS INCONSISTENT WITH THE STATUTE'S CLEAR INTENT

A. The Certification Requirement Embodied In § 605(c)(1) Of The CDA Provides Clear Direction And Does Not Require Regulatory Interpretation

Section 605(c)(1) of the CDA requires contractors to certify all claims exceeding $50,000 that are to be submitted to the Government under the CDA. The statute is straightforward and unambiguous. The CDA defines contractor as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). The term "contractor" may refer either to an individual or to a company. A company necessarily acts through individuals who are vested with authority, under the principles of agency, to bind the company.

In *Little River Lumber Co. v. United States*, 21 Cl. Ct. 527 (1990), the court examined whether Congress in-

tended for the law of agency to govern corporate certification of claims under the CDA and concluded that it did. The court stated:

> Corporations must act through individuals, and the ordinary rule is that an individual who is properly appointed as an agent of a corporation has the authority to bind that corporation within the scope of his or her authority.
>
> * * * *
>
> There is nothing in the wording of Section 605(c)(1) that suggests this ordinary rule should not apply to certification of claims.

Id. at 533. In contrast, the decision below concluded that § 605(c)(1)'s silence as to precisely who within a corporate contractor's organization has authority to certify a claim on behalf of a contractor constitutes a "gap" that FAR § 33.207(c)(2) permissibly fills. Pet. App. A at 5a. Careful review of the CDA's language and its legislative history confirms that there simply is no "gap" in § 605(c)(1) that requires filling.[9]

The reliance by the decision below on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is clearly misplaced. *Chevron* instructs that the starting point of statutory construction is whether the language of the statute is clear on its face. If it is, a court need look no further than the statute itself to determine the statute's meaning. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambigu-

---

[9] The Senate added the certification requirement codified at § 605(c)(1) on October 12, 1978. During earlier hearings on the CDA in 1978, Admiral Rickover suggested that the CDA should include a provision that required a contractor's certificate to be executed by a senior official within the contractor's organization. As the court in *Little River Lumber Co. v. United States*, correctly stated, however, "[u]ltimately, Congress did not adopt [Admiral Rickover's] suggestion when it drafted the specific language of Section 605." *Id.* at 534.

ously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). "The plain meaning of the Statute decides the issue presented." *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403 (1988) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *Chevron*).

We respectfully submit that § 605(c)(1) of the CDA is clear on its face. It reflects congressional intent that the contractor should choose for itself who within its organization should have authority to bind the company through claim certification.

B. In Contrast To The CDA, The 1979 DoD Authorization Act Explicitly Identifies A Limited Category Of Individuals Who Are Authorized To Certify Contractor Claims In Excess Of $100,000

During the same time frame that Congress enacted the CDA in 1978, it also passed the Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611 (1978) ("1979 DoD Authorization Act"). Section 813 of the 1979 DoD Authorization Act prohibits *payment* of a contract claim exceeding $100,000 from funds authorized to be appropriated to the Department of Defense "*unless a senior company official in charge at the plant or location involved has certified* at the time of submission . . . that the claim or request is made in good faith and that the supporting data are accurate and complete to the best of such official's knowledge and belief." 92 Stat. at 1624-25 (emphasis added).

The differences between the certification requirements in § 605(c)(1) of the CDA and those in § 813 of the 1979 DoD Authorization Act are obvious. Congress considered, and clearly rejected, Admiral Rickover's recommendation that the CDA specify precisely which individuals within a contractor's organization would be authorized to execute a CDA certification on behalf of a contractor. In contrast, Congress chose to include a separate certification provision in the 1979 DoD Authorization

Act. This certification requirement, modeled on Admiral Rickover's suggestion, has nothing to do with the CDA or the jurisdiction of the twelve boards of contract appeals or the United States Claims Court. It relates strictly to the right of the Defense Department to use appropriated funds to pay claims in excess of $100,000.

The contemporaneous enactment of the two statutory provisions offers strong indication that had Congress intended to specify in § 605(c)(1) of the CDA precisely *who* within a contractor's organization would be authorized to certify a claim on behalf of a contractor, it would have included language in the CDA similar to that included in the 1979 DoD Authorization Act. In fact, it considered and rejected this proposal. The Federal Circuit's conclusion that there is a "gap" in the CDA's certification coverage is simply wrong.

C. Even If The Issuance Of An Interpretative Guideline To § 605(c)(1) Of The CDA Was Appropriate, The OFPP's Interpretation In This Instance Is Not Entitled To Deference

Section 607(h) of the CDA, entitled "Procedural Guidelines", confers upon the OFPP authority to issue *guidelines* in connection with the administration of the CDA before the boards of contract appeals. The section expressly limits OFPP's regulatory authority, however, to issue "criteria for the establishment, functions, and procedures of agency boards." *Id.* Courts are required to give less deference to agency interpretative guidelines than they give to agency regulations that are promulgated pursuant to a congressional declaration that such regulations shall have the force and effect of law. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

OFPP's interpretation of § 605(c)(1), now reflected in FAR § 33.207(c)(2), should be accorded little deference. First, for well over a year after the CDA went into effect, OFPP did not issue any interpretation or guid-

ance regarding the certification requirement included in § 605(c)(1) of the CDA. During this period, the sufficiency of a contractor's CDA certification was, appropriately, measured by standard agency principles. Second, OFPP's interpretation of the CDA's certification requirement, as currently reflected in FAR § 33.270(c)(2), represents a departure from OFPP's initial position. "An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n.30 (quoting from *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

OFPP first published a proposed "direction" regarding "Uniform Rules of Procedure for Boards of Contract Appeals" on January 25, 1979, along with a proposed amendment to § 1-314 of the Defense Acquisition Regulation and § 1-1.318 of the Federal Procurement Regulations regarding claim certification requirements. OFPP's proposed amendments read in pertinent part:

> In the case of claims or amendments to claims exceeding $50,000 . . . *the Contractor shall certify*, when the Contracting Officer and the Contractor agree that the claim is ready for a decision under (f) below,

44 Fed. Reg. 5,224 (1979) (emphasis added). The certification form simply provided for the contractor's name and the title of the individual executing the certificate on behalf of the contractor. *Id.* This proposed amendment to the existing regulations and claim certification form suggests that OFPP initially believed there was no need for it to designate, through regulation, precisely which individuals would be empowered to execute CDA claims on behalf of federal contractors.

On March 7, 1979 OFPP published its interim final rule in the Federal Register. Once again, OFPP's interim rule made no mention of the issue of certification

authority. 44 Fed. Reg. 12,524 (1979). Nor did the next version of OFPP's certification form, which appeared in the Federal Register on June 14, 1979, address this issue in any way. 44 Fed. Reg. 34,229 (1979).

Nearly a year later, on May 9, 1980, OFPP published a policy directive that rescinded the office's previous guidance and the standard Contracts Dispute clauses published on March 7, 1979 and June 14, 1979, respectively. In addition, OFPP's May 9, 1980 policy directive purported to provide final regulatory coverage regarding the administration of § 605(c)(1) of the CDA. 45 Fed. Reg. 31,035 (1980).

It was not until issuance of its May 9, 1980 policy directive that OFPP decided to add a provision that placed limitations upon which individuals would be authorized to certify claims on behalf of contractors under the CDA. *Id.* at 31,036-37. But even with this change, OFPP itself indicated in its introductory comments that its guidance was technical and procedural in nature, not substantive:

> The final disputes clause and the regulations also provide *technical changes* from the interim clause and regulations with regard to payment of interest, *procedures for certification* of a claim exceeding $50,000 and other areas. These changes are made to better reflect the intent of the Contract Disputes Act.

Id. at 31,035 (emphasis added). The substance of the OFPP's 1980 "technical" changes remains in the current version of FAR § 33.207(c)(2).

D. The CDA's Certification Requirements Have Not Changed Since The Statute's Enactment In 1978

Despite the fact that the CDA's requirements regarding certification have not changed since the statute's enactment in 1978, the Court of Claims and Federal Circuit decisions that interpret the certification requirements cumulatively stand for the following fundamentally in-

consistent propositions: (1) with respect to a claim in excess of $50,000 that was submitted to a contracting officer between March 1979 and June 1, 1980, the boards and Claims Court were vested with subject matter jurisdiction to review the merits of such claim, provided the claim had been certified by an individual authorized to bind the company under the law of the agency; (2) with respect to claims submitted after June 1, 1980, the boards and Claims Court lack subject matter jurisdiction to review such claims unless the claims bear certifications executed by an individual who meets the rigid criteria set out in OFPP's "guidance". Surely, a federal court or board's subject matter jurisdiction cannot be such a fleeting power that it was present on May 31, 1979 but gone on June 1, 1980 without any intervening statutory changes.

Incredibly, the decision below elevates the changes that OFPP made to its guidance in 1980, which OFPP characterized as technical and procedural in nature, to jurisdictional in stature. The decision's holding that the jurisdiction of the boards of contract appeals and the United States Claims Court is to be measured by reference to the guidance in FAR § 33.207(c)(2), has, as the dissent below correctly points out, "create[d] not only analytical difficulties, but practical ones as well." App. A at 17a.

III. THE PANEL'S INTERPRETATION OF FAR § 33.207(c)(2)'S REQUIREMENTS IS ERRONEOUS

A. FAR § 33.207(c)(2)(i) Does Not Require That A Certifying Senior Company Official Be Physically Located At The Contractor's Plant

The decision below interpreted the requirements of FAR § 33.207(c)(2)(i) such that a senior company official who is in charge of the contractor's plant involved with the claim would not be entitled to certify the claim on behalf of the contractor unless he also maintained *a physical presence* at the contractor's plant. "The first de-

scription demands that the certifying senior company official have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." Pet. App. A at 9a (emphasis in original). The panel's interpretation adds a requirement that the regulation simply does not impose.

For many contractors, especially those with multiple locations, the court's interpretation of the regulation means that no one within their organization can meet the standard set out in FAR § 33.207(c)(2)(i). For these contractors, a plant manager physically located at a particular plant or location usually is not a "senior company official". Conversely, many contractors' senior company officials will no doubt be "in charge" of several plants or locations, and therefore, will not, in most instances, be physically located at the particular location performing the contractual effort. The panel's requirement of "physical presence" causes even more problems if the contract upon which a contractor's claim is based is performed in two or more locations, which is quite common within the Government contracting industry. Thus, the decision below, if allowed to stand, will require many contractors to look solely to FAR § 33.207(c)(2)(ii) to determine who within their organizations may certify claims under the CDA.

B. Contrary To The Holding In The Decision Below, FAR § 33.207(c)(2)(ii) Contemplates That A Number Of Officers Within A Contractor's Organization May Possess Overall Responsibility For A Contractor's Affairs

The panel's conclusion with regard to FAR § 33.207(c)(2)(ii)'s requirement is equally disturbing. The panel determined that Grumman's senior vice president and treasurer did not possess "overall responsibility for the conduct" of Grumman's affairs.[10] The panel denies

[10] The panel apparently accepted the ASBCA's conclusion that Grumman's senior vice president and treasurer had overall responsi-

that its interpretation of the regulation establishes the principle that a contractor's chief executive officer may be the only individual within a contractor's organization who is qualified under the CDA to certify a contractor's claim. "GAC grossly exaggerates in arguing that this court held in its earlier opinion, at least by implication, that a corporation's CEO is the only individual that may certify a corporate contractor's claim." Pet. App. A at 10a. However, the panel refuses to provide any guidance as to what is meant by the phrase "overall responsibility for the conduct of a contractor's affairs."

As a practical matter, the court's silence leaves contractors with few options. Following the Federal Circuit's decision below, most Government contractors must conclude that the only individual within their organization who is empowered to certify a claim under the CDA is the chief executive officer of the company. Most chief executive officers do not have any specific knowledge regarding a particular claim. Thus, the decision below has not only caused upheaval in the Government contracting community, it has run afoul of the whole purpose behind the CDA's certification requirement.

---

bility for financial affairs, but concluded that overall responsibility for financial affairs was not sufficient under the regulation. Pet. App. A at 10a.

CONCLUSION

For the reasons stated, NSIA respectfully urges this Court to grant the petition for certiorari filed by Grumman Aerospace Corporation.

Respectfully submitted,

STUART B. NIBLEY
Counsel of Record
MICHAEL B. HUBBARD
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for the Amicus Curiae National Security Industrial Association

Dated: June 21, 1991

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

No. 90-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SHIPBUILDERS COUNCIL OF AMERICA BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, GRUMMAN AEROSPACE CORPORATION

JOHN G. DEGOOYER
Counsel of Record
RONALD A. UITZ
HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Amicus Curiae Shipbuilders Council of America

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
THE AMICUS AND ITS INTERESTS	1
REASONS FOR GRANTING THE PETITION	4
I. IMPORTANT POLICIES AND OBJECTIVES OF THE CONTRACT DISPUTES ACT ARE FRUSTRATED BY THE DECISION OF THE COURT BELOW	6
II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY JURISDICTION TO CORRECT THE UNPRECEDENTED AND PATENTLY ERRONEOUS READING GIVEN THE CONTRACT DISPUTES ACT AND THE FAR CERTIFICATION REGULATION BY THE COURT BELOW	13
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Alaska Lumber and Pulp Co., Inc., AGBCA No. 82-107-1, 1990 Westlaw 34704 (March 20, 1990) 12

Blum v. Bacon, 457 U.S. 132 (1982) 13

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985) 13

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13

Columbia Mfg. Corp. v. N.L.R.B., 715 F.2d 1409 (9th Cir. 1983) 17

Crandon v. United States, 110 S.Ct. 997 (1990) ... 14

Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 13

Linn Timber, Inc., AGBCA No. 89-194-1, 90-1 BCA ¶ 22,625 (1990) 17

Little River Lumber v. United States, 21 Cl.Ct. 527 (1990) 12,17

Sullivan v. United States, 4 Cl.Ct. 70 (1983), *aff'd*, 742 F.2d 628 (Fed. Cir. 1984) (per curiam) ... 17

United States v. Larionoff, 431 U.S. 864 (1977) ... 17

United States v. Sherwood, 312 U.S. 584 (1941) ... 17

STATUTES:

Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (41 U.S.C. §§ 601 *et seq.*) 4,*passim*

Sec. 2(4), 41 U.S.C. § 601(4) 15

Sec. 6(c)(1), 41 U.S.C. § 605(c)(1) 4,15

Sec. 8(a)(1), 41 U.S.C. § 607(a)(1) 7

Sec. 8(d), 41 U.S.C. § 607(d) 7

Sec. 8(h), 41 U.S.C. § 607(h) 14

Table of Authorities Continued

	Page
Sec. 12, 41 U.S.C. § 611	11
Sec. 14(i), 92 Stat. 2391, *amending* 28 U.S.C. § 1491	7
Sec. 16, 41 U.S.C. § 601 (note)	15
Act of November 26, 1969, Pub. L. No. 91-129, 83 Stat. 269 (1969)	6
OFPP Act, Pub. L. No. 93-400, 88 Stat. 796 (1974)	17
10 U.S.C. § 2405	3,11
LEGISLATIVE MATERIALS:	
S. Rep. No. 93-692, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4589	17
S. Rep. No. 95-1118, 95th Cong. 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235	7,9,15
H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. (September 8, 1978)	9
124 Cong. Rec. S18636 (daily ed. Oct. 12, 1978)	14
124 Cong. Rec. S18640 (daily ed. Oct. 12, 1978)	15
124 Cong. Rec. 36266 (1978)	15
REGULATIONS:	
Federal Acquisition Regulation	
FAR 1.301, 48 C.F.R. § 1.301	11
FAR 1.304, 48 C.F.R. § 1.304	12
FAR 33.201, 48 C.F.R. § 33.201	11
FAR 33.207(c)(2), 48 C.F.R. § 33.207(c)(2)	4,15,16
Department of Defense FAR Supplement, 48 C.F.R. Chapter 2	12

Table of Authorities Continued

	Page
Department of Health and Human Services Acquisition Regulation, 48 C.F.R. Chapter 3	11
Department of Agriculture Acquisition Regulation, 48 C.F.R. Chapter 4	11
General Services Administration Acquisition Regulation, 48 C.F.R. Chapter 5	11
Department of State Acquisition Regulation, 48 C.F.R. Chapter 6	11
Agency for International Development Acquisition Regulation, 48 C.F.R. Chapter 7	11
Department of Veterans Affairs Acquisition Regulation, 48 C.F.R. Chapter 8	11
Department of Energy Acquisition Regulation, 48 C.F.R. Chapter 9	11
Department of Treasury (Protests, disputes, and appeals), 48 C.F.R. Chapter 10	11
Department of Transportation Acquisition Regulation, 48 C.F.R. Chapter 12	11
Department of Commerce Acquisition Regulation, 48 C.F.R. Chapter 13	11
Department of the Interior Acquisition Regulation, 48 C.F.R. Chapter 14	11
Environmental Protection Agency Acquisition Regulation, 48 C.F.R. Chapter 15	11
Office of Personnel Management Federal Employees Health Benefits Acquisition Regulation, 48 C.F.R. Chapter 16	11
Office of Personnel Management (Protests, disputes, and appeals), 48 C.F.R. Chapter 17	11
National Aeronautics and Space Administration FAR Supplement, 48 C.F.R. Chapter 18	11
United States Information Agency Acquisition Regulation, 48 C.F.R. Chapter 19	11

Table of Authorities Continued

	Page
Small Business Administration (Contractor qualifications), 48 C.F.R. Chapter 22	12
Department of Housing and Urban Development Acquisition Regulation, 48 C.F.R. Chapter 24	12
Department of Justice Acquisition Regulation, 48 C.F.R. Chapter 28	12
Department of Labor Acquisition Regulation, 48 C.F.R. Chapter 29	12
Department of Education Acquisition Regulation, 48 C.F.R. Chapter 34	12
Panama Canal Commission Acquisition Regulation, 48 C.F.R. Chapter 35	12
Federal Emergency Management Agency Acquisition Regulation, 48 C.F.R. Chapter 44	12
Department of the Army Acquisition Regulations, 48 C.F.R. Chapter 51	12
Department of the Navy Acquisition Regulations, 48 C.F.R. Chapter 52	12
Department of the Air Force FAR Supplement, 48 C.F.R. Chapter 53	12
African Development Foundation (Competition requirements), 48 C.F.R. Chapter 57	12
MISCELLANEOUS:	
44 Fed. Reg. 5,219 (Jan. 25, 1979)	16
44 Fed. Reg. 12,519 (March 7, 1979)	16
44 Fed. Reg. 12,524 (March 7, 1979)	16
44 Fed. Reg. 34,228 (June 14, 1979)	16
44 Fed. Reg. 34,229 (June 14, 1979)	16
45 Fed. Reg. 31,035 (May 9, 1980)	16
Report of the Commission on Government Procurement, December 1972, Vol. 1	6,7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1800

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

---

SHIPBUILDERS COUNCIL OF AMERICA BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, GRUMMAN AEROSPACE CORPORATION

The Shipbuilders Council of America, with the consent of all parties, submits this brief *amicus curiae* pursuant to Rule 37.2 of the Rules of this Court in support of the petition for a writ of certiorari filed by Grumman Aerospace Corporation.

THE AMICUS AND ITS INTERESTS

The Shipbuilders Council is a voluntary, nonprofit national trade association composed of fifty-three firms, corporations, partnerships and organizations lo-

cated in the United States that are involved in the shipbuilding industry. The Council was founded in 1920 for the purposes of (i) promoting a sound private shipbuilding and ship repairing industry in the United States, (ii) promoting an adequate mobilization potential of privately-owned shipbuilding, ship repairing and allied industries for availability in time of national emergency, and (iii) affording a means of cooperation between Government and industry in matters of national concern.

A major portion of the business of the Shipbuilders Council's members involves contracts with the federal Government, including contracts for the construction and repair of vessels for the United States Navy and Coast Guard, and for the development and production of communication, propulsion, radar, electronic, computer and other on-board systems for such vessels. Members of the Shipbuilders Council are currently performing contracts with the federal Government valued at many billions of dollars. These members are also involved in administrative or court proceedings resulting from the Government's denial of certified claims submitted under their contracts with the Government, or they have claims awaiting decisions by Government contracting officers. In either case, their claims were certified and, therefore, involve the same claim certification issue presented to this Court by Grumman Aerospace's petition. As a result, these claims will be directly affected by this Court's action on the petition.

While the decision below will adversely affect all non-individual Government contractors, its impact will be particularly acute for contractors who build ships for the Government because of an eighteen-month

statute of limitations applicable to contractor claims under Government shipbuilding contracts. 10 U.S.C. § 2405. Such contracts entered into after December 7, 1983 are not eligible for price increases—whether sought in a claim, request for equitable adjustment, or demand for payment—if the claim forming the basis for such an increase arose "out of events occurring more than 18 months before the submission of the claim, request, or demand." 10 U.S.C. § 2405(a). The statute further provides:

> A claim, request, or demand shall be considered to have been submitted only when the contractor has provided the certification required by section 6(c)(1) of the Contract Disputes Act of 1978 . . . .

10 U.S.C. § 2405(b).

The Navy interprets 10 U.S.C. § 2405 as requiring a "properly certified" claim in order to toll the running of this statute of limitations. As a result of the decision of the court below, therefore, shipbuilding claims now under administrative or judicial review are in jeopardy of being rejected on jurisdictional grounds even though the claims were "properly certified" under the law as it had been interpreted by the contract appeals boards and the Claims Court as of the time the certification was made. Because the government typically does not challenge the claim certification until well into appeal proceedings—often on the eve of trial—the eighteen-month limitations period will likely have already elapsed before the issue is even raised. Under the decision below, then, many meritorious shipbuilding claims could be forever barred.

The Shipbuilders Council and its members thus have a direct and substantial interest in the issues pre-

sented to this Court by Grumman Aerospace's petition and in urging this Court to review and reverse the decision of the court below.

REASONS FOR GRANTING THE PETITION

The decision of the court below presents important questions arising under the Contract Disputes Act of 1978 ("CDA"), Pub. L. No. 95-563, 92 Stat. 2383 (1978), *codified at* 41 U.S.C. §§ 601 *et seq.*, that have not yet, but should be, decided by this Court. In particular, the Court is asked to resolve the meaning of the statutory requirement imposed by Congress in the CDA that contract claims against the government in excess of $50,000 be certified by the "contractor." CDA § 6(c)(1), 41 U.S.C. § 605(c)(1). A second, related question concerns the force and effect of a regulation originally promulgated in 1980 by the Office of Federal Procurement Policy ("OFPP"), now found in the Federal Acquisition Regulation ("FAR") 33.207(c)(2), 48 C.F.R. §33.207(c)(2), which purports to define what categories of employees of a non-individual "contractor" must certify claims in order to satisfy the CDA's statutory requirement.

The court below held, *inter alia*, (i) that the FAR certification regulation was validly promulgated by OFPP because it allegedly filled a gap left by Congress in the CDA, (ii) that the regulation, therefore, has the force and effect of law, and (iii) that, if a certifier fails to match the *regulation's* definition of who must certify Government contract claims, the agency contract appeals boards are stripped of their *statutory* subject matter jurisdiction to adjudicate such claims. Petition, Appendix ("App.") 4a-9a. The court below found that Grumman Aerospace's certifier did

not match the regulatory definition, as interpreted by the court, and vacated the favorable decision that Grumman Aerospace had obtained on the merits before the Armed Services Board of Contract Appeals ("ASBCA"). App. 9a-11a.

In holding that the FAR certification regulation defines the subject matter jurisdiction of the tribunals charged with adjudicating Government contract claims under the CDA, the court below has condoned manipulation of the jurisdiction of contract appeals boards by the procuring agencies litigating against contractor claims before those boards. Such a result directly contravenes the will of Congress as expressed in the CDA and its legislative history, resurrects the precise evil that Congress sought to purge from the procurement process in enacting the CDA and permits, if not encourages, the procuring agencies to subvert the laudable, remedial purposes of the CDA. The decision of the court below also allows these procuring agencies to define, separately for their own agency contracts, the subject matter jurisdiction not only of the contract appeals boards, but also of the United States Claims Court—a bizarre result never intended by Congress.

The court below reached these erroneous results by misreading and misapplying controlling precedent of this Court, ignoring the express language and intent of Congress in defining OFPP's limited role in the CDA statutory scheme, and thereby mistakenly concluding that it was required to accord deference to OFPP in its promulgation of the FAR certification regulation at issue.

These failures of the court below constitute special circumstances calling for review and reversal by this Court.

I. IMPORTANT POLICIES AND OBJECTIVES OF THE CONTRACT DISPUTES ACT ARE FRUSTRATED BY THE DECISION OF THE COURT BELOW

Since the earliest days of our Nation, the Government has purchased goods and services from the private sector. From the beginning and continuing until the present day, the procurement process has been beset by problems including—to a greater or lesser degree—profiteering, influence peddling, fraud, mismanagement, inefficiency, and inconsistency. On several occasions over these two hundred years, the procurement process and its attendant problems have been studied by Congress and various commissions (*e.g.*, Dockery, Keep, First Hoover, and Second Hoover Commissions), often yielding proposals to reform and improve the process.[1]

The latest and most comprehensive such study was conducted at the direction of Congress by the Commission on Government Procurement, created by Act of November 26, 1969, Pub. L. No. 91-129, 83 Stat. 269 (1969). This Commission was charged with the responsibilities of (i) studying and investigating the entire federal Government procurement process and (ii) recommending to Congress methods "to promote the economy, efficiency, and effectiveness in the procurement of goods, services and facilities by and for the executive branch of the Federal Government . . . ." *Id.*, 83 Stat. at 269-270. "Until that time

---

[1] *See Report of the Commission on Government Procurement*, December 1972 ("*Report*"), Vol. 1 at 163-184.

there had been no comprehensive examination devoted exclusively to the system by which claims by and against the Government with regards to Government contracts should be adjudicated." S. Rep. No. 95-1118, 95th Cong. 2d Sess. (1978) at 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235, 5238.

Over a two year period, the Commission collected and analyzed massive amounts of material and information derived from procurement reports, congressional testimony, documents, comments, opinions, questionnaires, interviews and public meetings. *See Report*, Vol. 1 at vii-viii. In December 1972, the Commission reported the results of its extensive study to Congress, making 149 specific recommendations for improving the procurement process. *Report*, Vol. 1 at 185-199. The Commission's recommendations that were directed toward contract disputes, *Id.* at 197, formed the framework for consideration and eventual enactment of the CDA by Congress six years later. *See* S. Rep. No. 95-1118 at 1-5.

In the CDA, Congress authorized agencies to establish boards of contract appeals, CDA § 8(a)(1), 41 U.S.C. § 607(a)(1), and granted to those boards jurisdiction "to decide any appeal from a decision of a contracting officer." CDA § 8(d), 41 U.S.C. § 607(d). Concurrent jurisdiction over such matters was also given to the United States Court of Claims (now the United States Claims Court). CDA § 14(i), 92 Stat. 2383, 2391, *amending* 28 U.S.C. § 1491. The legislative history of the CDA leaves no doubt that Congress was creating order and uniformity out of the preexisting disarray and, in particular, was seeking to eliminate procedural and substantive inconsistencies in the adjudication of contract claims by pre-

venting the agencies from manipulating the procurement disputes process to their own separate and individual ends.

> The Contract Disputes Act of 1978 provides a fair, balanced, and *comprehensive statutory* system of legal and administrative remedies in resolving Government contract claims.
>
> * * * * *
>
> The present means for resolving disputes under Government contracts is a mixture of contract provisions, agency regulations, judicial decisions, and statutory coverage. Basically the methods and forums for handling such disputes exist by executive branch fiat—that is, by the insertion of contract terms specifying how disputes in specific areas will be resolved—and by agency regulations governing the procedural and substantive adjudication of disputes.
>
> * * * * *
>
> In large part, the present Government contract remedies system has developed in an unplanned manner. Many rules and requirements that govern the system are the result of unstructured reactions to various events and decisions. The predilections of different agencies . . . bring forth new provisions and procedures that are restrictive and uncoordinated.
>
> * * * * *
>
> While the existing dispute system may have been satisfactory in earlier years, the complexity of Government procurement demands the enactment of a more efficient procedure. How pro-

> curement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors—or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. Rep. No. 95-1118 at 1-4 (emphasis added)[2]

Ignoring this clear expression of congressional intent, the court below sanctioned the very agency conduct that Congress sought to eliminate in enacting the CDA. For purposes of evaluating whether the ASBCA had statutory subject matter jurisdiction, the court below deferred to OFPP in its promulgation of the claim certification regulation and to the procuring agency's argument that the contractor's certification did not satisfy that regulation. App. 4a-7a. Yet, this result not only runs directly afoul of the express intent of Congress to *divest* the agencies of their previous power to define the jurisdiction of the boards through disputes clause requirements and regulations,

---

[2] Interestingly, when the CDA was in draft form, the Department of Defense sought to preserve its previous ability to manipulate board jurisdiction: "We believe that leaving applicability of the Disputes procedure to procurement and other departmental regulations should continue." *See* Letter of General Counsel of the Department of Defense dated June 23, 1978 to Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives, attached to H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. at 52 (Sept. 8, 1978). Congress expressly rejected DOD's request: "[T]he bill provides a new statutory basis for Agency Boards of Contract Appeals." *Id.* at 19.

but it also creates the potential for further subversion by the agencies of the CDA's uniform contract dispute resolution process.

Numerous problems are engendered when an agency, on the basis of its interpretation of its own regulation, can challenge the subject matter jurisdiction of the forum that is adjudicating a contractor's claim against the same agency. Congress determined that creating a new, uniform statutory basis for the jurisdiction of the contract appeals boards would eliminate those problems. Now, under the decision of the court below, agencies litigating contractor claims, whether in the Claims Court or any contract appeals board, are free at any time in the course of the proceeding to challenge a claim certification on the ground that the agencies' interpretation of the claim certification regulation suggests that an "improper" person had certified the claim, and thereupon demand dismissal of the appeal.

Such agency challenges come with ill grace, because the agency's contracting officer must have already determined in the first instance that a proper person had certified the claim in order to render a final decision, which is a prerequisite to an appeal. Thus, an agency is free to manipulate at will the jurisdiction of a board, or the Claims Court, within a single case to the prejudice of the contractor: first, the agency, through its contracting officer, permits the appeal to be filed by issuing a final decision, but then later, through its litigation counsel, contests the validity of the certification by a *post hoc* reapplication of the regulation and demands dismissal. This is precisely what happened to Grumman Aerospace in this case and to other government contractors in other cases.

The agency's motivation for such duplicity is that it does not have to pay CDA statutory interest for the period during which it delays contesting jurisdiction[3] and, in the case of shipbuilding claims subject to the eighteen-month statute of limitations in 10 U.S.C. § 2405, the agency can avoid all liability for the contractor's claim if that statute has run.

Under the decision of the court below, the procuring agencies are free to manipulate the procurement process in yet another way that also clearly contravenes the will of Congress in enacting the CDA. The claim certification regulation is incorporated in the FAR and, under the regulatory scheme, each procuring agency subject to the FAR may promulgate its own supplement thereto. FAR 1.301, 48 C.F.R. § 1.301.[4] The decision of the court below now allows

---

[3] In the CDA, Congress provided that "[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof." CDA § 12, 41 U.S.C. § 611. However, in defining "claim" for its purposes, the FAR provides that a claim exceeding $50,000 "is not a claim under the [CDA] until certified as required by the Act *and* 33.207." FAR 33.201, 48 C.F.R. § 33.201 (emphasis added).

[4] *See* 48 C.F.R. Ch. 3 (Health and Human Services); 48 C.F.R. Ch. 4 (Agriculture); 48 C.F.R. Ch. 5 (General Services Administration); 48 C.F.R. Ch. 6 (State); 48 C.F.R. Ch. 7 (Agency for International Development); 48 C.F.R. Ch. 8 (Veterans Affairs); 48 C.F.R. Ch. 9 (Energy); 48 C.F.R. Ch. 10 (Treasury); 48 C.F.R. Ch. 12 (Transportation); 48 C.F.R. Ch. 13 (Commerce); 48 C.F.R. Ch. 14 (Interior); 48 C.F.R. Ch. 15 (Environmental Protection Agency); 48 C.F.R. Chs. 16 and 17 (Office of Personnel Management); 48 C.F.R. Ch. 18 (National Aeronautics and Space Administration); 48 C.F.R. Ch. 19 (United States Information

each agency subject to the FAR to promulgate its own supplemental claim certification regulation to further define and refine who must certify claims under contracts *with that agency*, so long as the supplemental definition allegedly fills a gap in the CDA and is not in conflict with or inconsistent with the FAR content. FAR 1.304, 48 C.F.R. § 1.304. This, of course, marks a return to the very lack of uniformity in the "procedural and substantive adjudication of disputes" that Congress purged from the procurement process when it enacted the CDA thirteen years ago.[5]

These consequences of the decision below, so plainly contrary to the will of Congress, demand correction by this Court.

Agency); 48 C.F.R. Ch. 22 (Small Business Administration); 48 C.F.R. Ch. 24 (Housing and Urban Development); 48 C.F.R. Ch. 25 (National Science Foundation); 48 C.F.R. Ch. 28 (Justice); 48 C.F.R. Ch. 29 (Labor); 48 C.F.R. Ch. 34 (Education); 48 C.F.R. Ch. 35 (Panama Canal Commission); C.F.R. Ch. 44 (Federal Emergency Management Agency); and 48 C.F.R. Ch. 57 (African Development Foundation). In the case of the Department of Defense, it has promulgated its own supplement to the FAR ("DFARS"), 48 C.F.R. Ch. 2, and the Army, Navy and Air Force have in turn promulgated their own supplements to the DFARS. 48 C.F.R. Chs. 51, 52 and 53.

[5] The FAR certification requirement has already produced the anomaly that CDA claims submitted under contracts subject to the FAR are judged by the FAR's restrictive standard of who must certify claims on behalf of non-individual contractors, while CDA claims submitted under contracts not subject to the FAR are judged by the rational standard that a certifier authorized to bind the "contractor" satisfies the will of Congress in the CDA. *See Little River Lumber v. United States*, 21 Cl.Ct. 527, 533-34 (1990); *Alaska Lumber and Pulp Co., Inc.*, AGBCA No. 82-107-1, 1990 Westlaw 34704 (March 20, 1990).

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY JURISDICTION TO CORRECT THE UNPRECEDENTED AND PATENTLY ERRONEOUS READING GIVEN THE CONTRACT DISPUTES ACT AND THE FAR CERTIFICATION REGULATION BY THE COURT BELOW

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated the principles governing judicial review of interpretations by administrative agencies of the statutes they are entrusted by Congress with the duty to administer. Before applying this Court's *Chevron* principles of deference to agency action, however, a reviewing court must first determine whether Congress has delegated to the agency a duty to administer the statute in question or, to put it differently, whether Congress has empowered the agency to regulate in the first place.[6] In this case, the court below

---

[6] *See, e.g., Chevron*, 467 U.S. at 842, 844 (EPA accorded deference since it was entrusted to administer statutory scheme of Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685); *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 118 & n.2, 125 (1985) (EPA accorded deference since it was entrusted to administer Clean Water Act, 33 U.S.C. § 1251 *et seq.*); *Blum v. Bacon*, 457 U.S. 132, 139-140 & n.8, 141-142 (1982) (Secretary of Health, Education and Welfare accorded deference since he was charged with administering federal funding for emergency assistance programs under Title IV-A of Social Security Act, 42 U.S.C. § 603(a)(5)); and *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 45 (1981) (Commission accorded deference because Congress vested it with primary and substantial responsibility for enforcing Federal Election Campaign Act of 1971, 2 U.S.C. ¶¶ 431 *et seq.*, and provided the agency with extensive rulemaking and adjudicative powers). By contrast, regulatory interpretations of a statute made by an agency that has *not* been delegated specific responsibility to

made no such inquiry and made no such determination. Instead, the court improperly invoked *Chevron* and thereby erroneously concluded that it was required to defer to the agency's judgment and to its regulation. App. 4a-7a. Had the court not ignored the critical, indispensable first step of a proper *Chevron* analysis, it would have quickly discerned that the FAR certification regulation is entitled to no deference at all and cannot, therefore, have the force and effect of law.

The *only* authority that Congress granted to OFPP in the CDA statutory scheme was the specific and strictly limited authority to "issue guidelines with respect to criteria for the establishment, functions, and procedure of the agency boards." CDA § 8(h), 41 U.S.C. § 607(h). Congress did not empower OFPP to administer the CDA, or to promulgate any regulation whatsoever, much less a binding legislative regulation defining the subject matter jurisdiction of the courts and contract appeals boards to adjudicate contract disputes. The language of the CDA could not be clearer, but even even if resort to the legislative history of the CDA were appropriate, it too affirms that the authority granted to OFPP was strictly limited.[7]

---

administer that statute are *not* entitled to deference under the *Chevron* principles. *See Crandon v. United States*, 110 S.Ct. 997, 1011 (1990) (Scalia, J., concurring).

[7] Originally, the bill reported out of committee in the Senate, directed OFPP to "issue *rules and regulations* with respect to" the establishment, functions, and procedures of the agency boards. 124 Cong. Rec. S18636 (daily ed. Oct. 12, 1978) (emphasis added). Even at that, OFPP's role was unmistakably limited, almost clerical in nature, *i.e.*, "developing . . . workload study formats; being the central clearing point for collection of

The specific claim certification provision of the CDA at issue in this case, CDA § 6(c)(1), 41 U.S.C. § 605(c)(1), has no legislative history. The provision is not discussed in the committee reports because it was added by amendment on the Senate floor—without explanation or discussion—on the day the Senate passed the legislation and the day before the House passed it. *See* 124 Cong. Rec. 36266, 37074-76 (1978). The only guidance as to the meaning and intent of this provision insofar as this case is concerned, therefore, is the statute's plain language that claims in excess of $50,000 shall be certified by the "contractor" and the statute's definition of "contractor" for these purposes as "a party to a Government contract other than the Government." CDA §§ 6(c)(1) & 2(4), 41 U.S.C. §§ 605(c)(1) & 601(4).

It is against this legislative backdrop that OFPP promulgated the claim certification regulation that lies at the heart of this case and which is now found at FAR 33.207(c)(2), 48 C.F.R. § 33.207(c)(2). Section 16 of the CDA provides that the "Act shall apply to contracts entered into one hundred twenty days after the date of enactment." *See* 41 U.S.C. § 601 (note). On at least three separate occasions, OFPP relied on this provision as its authority to issue proposed rules, stating that the proposed contract and regulatory coverage was necessary because the CDA required cer-

---

. . . agency's workload studies; and acting in concert with the agency head in the establishment of each board." S. Rep. No. 95-1118 at 27. Later, on the Senate floor the words "rules and regulations with respect to" in the bill were eliminated and replaced by the words "*guidelines with respect to the criteria for*." 124 Cong. Rec. S18640 (daily ed. Oct. 12, 1978) (emphasis added).

tain changes to clauses and procurement regulations of the procuring agencies by March 1, 1979 (one hundred twenty days after the CDA was signed into law on November 1, 1978). *See* Proposed Rules, 44 Fed. Reg. 5,219 (Jan. 25, 1979); Interim Final Rules, 44 Fed. Reg. 12,519 (March 7, 1979); Final Rules and Proposed Contract Disputes Clause, 44 Fed. Reg. 34,228 (June 14, 1979).

The interim final rules set forth an interim disputes clause, including a requirement that contractors certify claims. 44 Fed. Reg. at 12,524. When it published the final rules, OFPP modified the interim disputes clause and invited comments. 44 Fed. Reg. at 34,229. Up to and including this point, however, both the proposed rules and interim disputes clauses required "*the contractor*" to certify claims, in exactly the same language as Congress had specified in the CDA.

Then, on May 9, 1980, OFPP issued what it termed a "policy directive" (OFPP Policy Letter 80-3), again based on Section 16 of the CDA, which completely rescinded the previous "final" regulations, and set forth new final regulations and a final disputes clause. Final Contract Disputes Regulatory Coverage and Contract Disputes Clause, 45 Fed. Reg. 31,035 (May 9, 1980). For the first time, the regulation included the restriction now found at FAR 33.207(c)(2), which purports to describe who must certify a claim on behalf of a non-individual contractor. OFPP described the restriction as a "technical" change "made to better reflect the intent of the Contract Disputes Act." *Id.* OFPP provided no opportunity for notice and comment on this change.[8]

---

[8] This alone prevents the regulation from having the force and

It is clear from the foregoing that the assignment given to OFPP by Congress was narrow and specific and did not authorize OFPP's unfettered excursion into any other areas, and certainly not into subject matter jurisdiction of the contract appeals boards or the Claims Court. Moreover, it is equally clear from

---

effect of law, since OFPP is required to follow notice and comment procedures. *See* OFPP Act, Pub. L. No. 93-400, 88 Stat. 796, 797 § 6(d)(2) (1974) and S. Rep. No. 93-692, 93d Cong., 2d Sess. at 1 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4589, 4601-02. But even if OFPP had been authorized to promulgate the regulation and had done so properly, the regulation conflicts with the legislation it purports to implement, and thus cannot have force or effect. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("regulations, in order to be valid, must be consistent with the statute under which they are promulgated"); *Sullivan v. United States*, 4 Cl.Ct. 70, 73 (1983) ("a regulation which is clearly incompatible with the statute under which it was ostensibly promulgated must give way"), *aff'd*, 742 F.2d 628 (Fed. Cir. 1984) (per curiam). There can be no doubt that the regulation conflicts with the CDA when the same certification can simultaneously be "clearly" invalid under the regulation yet clearly valid under the plain language of the CDA. *See Little River*, 21 Cl.Ct. at 534 (not reaching the issue of whether the certification regulation is valid or material to the court's jurisdiction because the contracts involved were not subject to the FAR). Under the CDA, Congress intentionally conferred statutory jurisdiction to the Boards so that *no* agency regulation or dispute clause requirement could alter their jurisdiction. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 590 (1941) (a rule that purports to alter jurisdiction conferred by Congress is invalid); *Columbia Mfg. Corp. v. N.L.R.B.*, 715 F.2d 1409, 1410 (9th Cir. 1983) (same). *Cf. Linn Timber, Inc.*, AGBCA No. 89-194-1, 90-1 BCA ¶ 22,625 at 113,482 (1990) (refusing to enforce contract disputes clause requirement for certification of claims for less than $50,000 since "such an act is obviously the sole province of Congress"). Yet according to the decision below, whether or not a contract is subject to the FAR is a potentially dispositive jurisdictional inquiry.

the regulation's language and the context in which it was promulgated that OFPP itself intended merely to provide an interpretation of the CDA's dispute procedures for inclusion in agency contracts and rules—not to define the subject matter jurisdiction of the claims tribunals.

In these circumstances, the court below should not have deferred to the assumed judgment and expertise of the agency, but instead should have determined whether the limiting language of the FAR certification regulation could be squared with the statutory grant of subject matter jurisdiction to the contract appeals boards and the Court of Claims to adjudicate claims certified by the "contractor." Had the court done so, it never could have rendered the decision it did. This Court should, therefore, review and reverse that erroneous decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. DEGOOYER
Counsel of Record
RONALD A. UITZ
HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Amicus Curiae
Shipbuilders Council of America

June 1991

Supreme Court, U.S.
FILED
JUL 15 1991
OFFICE OF THE CLERK

No. 90-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GRUMMAN AEROSPACE CORPORATION FOR WRIT OF CERTIORARI

DUNAWAY & CROSS
MAC S. DUNAWAY
Counsel of Record

GARY E. CROSS
1146 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 862-9700

Attorneys for Amicus Aerospace Industries Association of America, Inc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE REGULATION EXCEEDS OFPP'S STATUTORY AUTHORITY	3
A. Implied Delegation	3
B. 41 U.S.C. § 607(h)	7
II. THE OFPP'S CLAIM-CERTIFICATION REGULATION PROVIDES NO GUIDANCE TO CONTRACTORS AND, AS INTERPRETED, VIOLATES THE CDA	8
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426 (Fed. Cir. 1989) 11

Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986) 4-5,8-9

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4

Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) 5,6

J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) 6

Mistretta v. United States, 488 U.S. 261 (1989) ... 6

Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) 6

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 6

Triax Co. v. United States, 20 Cl. Ct. 507 (1990) 11,12

United States v. Grumman Aerospace Corp., 927 F.2d 575 (Fed. Cir. 1990) ..... *passim*

STATUTES:

Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 –

41 U.S.C. § 601(4) 4

41 U.S.C. § 605(c)(1) 3

41 U.S.C. § 607(h) 4,7,8

Department of Defense Authorization Act of 1979, 10 U.S.C. § 2410 6,9

REGULATIONS:

Federal Acquisition Regulation 33.207(c)(2), 48 C.F.R. § 33.207(c)(2) ..... *passim*

Table of Authorities Continued

Page

OTHER AUTHORITIES:

GAC Petition for Writ of Certioriari to the United States Court of Appeals for the Federal Circuit, No. 90-1800 (filed May 24, 1991) 3-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1800

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICUS CURIAE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GRUMMAN AEROSPACE CORPORATION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Aerospace Industries Association of America, Inc. ("AIA") is the national trade association representing the manufacturers of aerospace equipment. Virtually all of AIA's member-companies provide goods and services under contract to the United States Government. Many of those members, including petitioner Grumman Aerospace Corporation ("GAC"), derive a

substantial portion of their revenues from Government contracts. Taken together, AIA members have thousands of Government contracts worth billions of dollars. AIA member-companies have had in the past, and will have in the future, disputes with federal agencies that interpret the certification requirements of the Contract Disputes Act of 1978 ("CDA").

SUMMARY OF THE ARGUMENT

The opinion of the United States Court of Appeals for the Federal Circuit in this case elevates the "gap-filling" authority of Government agencies to an unprecedented level. Even if there had been a regulatory gap to fill in the simple statutory certification requirement of the CDA—and there was not—the Office of Federal Procurement Policy ("OFPP") only widened the gap by issuing a regulation whose ambiguities make predicting the validity of the certification for a given claim impossible. The confusion that arises from the face of the regulation has been deepened by the agency's strained application of it in this and other cases. The Federal Circuit only exacerbated this situation by advancing an overbroad view of agency authority and through its own idiosyncratic view of how the regulation, susceptible of many meanings, should be read.

The outcome is that contractors large and small, sophisticated and novice, are at a loss to determine how to comply with this straightforward legislative requirement in its regulatory incarnation. Some contractors may reasonably conclude that they are incapable of certifying their claims, or many of them, absent a reorganization of their business assignments. Short of this, other contractors must balance meeting

the convoluted personnel descriptions of the regulation against the actual functions of their employees in an effort to divine who may be capable of making a valid certification. Threats of corporate and personal liability, as well as considerable financial jeopardy, attend the risk of an erroneous guess.

The panel's singleminded deference to the OFPP is responsible for transforming a clear statutory provision into the present state of confusion, losing the plain meaning of the law in the process. Granting GAC's petition for a writ of certiorari is necessary to correct a distortion of legislative intent in the CDA, and a tilt toward administrative agency aggrandizement in general.

ARGUMENT

I. THE REGULATION EXCEEDS OFPP'S STATUTORY AUTHORITY

A. Implied Delegation

The CDA contains a simple requirement calling for "the contractor" to certify claims in excess of $50,000. 41 U.S.C. § 605(c)(1). If OFPP had not confused the matter by interpreting the meaning of "contractor" in a regulation, 48 C.F.R. § 33.207(c)(2), there is no reason to believe that contractors and Government contracting agencies would be unable to ascertain the meaning of that statutory term for purposes of the certification requirement. As the instant petition and Judge Plager's dissent point out, the "contractor," when it is a corporation, is simply any individual who speaks for the organization within the scope of his authority. *See* GAC Petition for Writ of Certioriari to the United States Court of Appeals for the Federal Circuit, No. 90-1800 (filed May 24, 1991) ("GAC Pet.")

at 15-16; *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 582 (Fed. Cir. 1990) (Plager, J., dissenting). There is no hint in the CDA that Congress intended for OFPP to develop a special definition of "contractor" for purposes of certification.[1]

Yet the panel found that the CDA implicitly authorized OFPP to state by way of regulation *precisely* which corporate officials could and could not certify claims. The panel relied heavily on this Court's reasoning in *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,843-44 (1984). In particular, the Federal Circuit drew on the following language: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." *Grumman Aerospace Corp.*, 927 F.2d at 578. The panel concluded that the regulation merely served "to fill the gap implicitly left by Congress respecting *who* may certify pursuant to that section." *Id.* (emphasis in original). The panel cited no statutory language or legislative history as grounds for finding such implicit legislative authority.[2]

To be sure, sometimes a legislative delegation is explicit and at other times it is implicit. In many cases, however, it is simply absent. Not every undefined word, concept or requirement in a statute leaves a gap calling for agency interpretation. As stated in *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, "The statute may be im-

---

[1] Congress defined "contractor" in the CDA as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4).

[2] The panel's citation of 41 U.S.C. § 607(h) is discussed *infra* p. 7-8.

perfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." 474 U.S. 361, 374 (1986) (footnote omitted). Without some limit to implied legislative delegation, there would be no substance to the long-standing doctrine that "legislators are to make laws, not legislators." *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607,686 (1980) (Rehnquist, J., concurring).

For example, the certification requirement of the CDA does not state what inquiry an individual must make before certifying a claim, although a reasonable statutory scheme might well contemplate that some inquiry should precede a good-faith certification. Congress could have imposed detailed requirements to address this policy issue, especially given the indications that certification was intended to trigger contractor liability. *Grumman Aerospace Corp.*, 927 F.2d at 597. But absent any indication that Congress intended such requirements, OFPP is not free to formulate them on the sole ground that they might further the legislation's goals. It might also have been advisable for Congress to have limited the individuals who could certify claims by requiring that they have overall corporate authority or special cognizant authority regarding the claim. Congress chose not to do so and did not indicate in any way that it left a gap for OFPP to fill.

A finding of implied delegation in this case cannot rest on the conclusion that "the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not nec-

essarily expert in the area in which they choose to legislate. . . ." *American Petroleum Inst.*, 448 U.S. at 675. Who shall certify a claim's validity on behalf of a corporation is not a technical matter beyond the ken of Congress. In the Department of Defense Authorization Act of 1979, 10 U.S.C. § 2410, which was enacted contemporaneously with the CDA, Congress specified the qualifications of those who could certify particular claims against DOD, demonstrating beyond cavil that Congress is capable of doing so when it wishes. In light of this, the panel's statement that it is "not privy to all of the agency's reasons for its regulation and lack[s] the expertise developed by the agency in dealing with all aspects of certification," *Grumman Aerospace Corp.*, 927 F.2d at 579, rings especially hollow. The legislative power, not agency expertise, is the overriding principle that should have decided this case.

There are limits upon Congress's authority to delegate its legislative power expressly, including the requirement that Congress clearly delineate the contours of any delegation. *See, e.g., Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Mistretta v. United States*, 488 U.S. 361 (1989). The panel's finding of an implied delegation in this case either ignores this requirement or bootstraps it. The panel perceives some uncertainty regarding who may certify and then takes that uncertainty as legislative authority for OFPP to adopt a regulation out of whole cloth. This approach would justify all manner of regulation by emasculating the principle that the legislature may delegate but not abdicate. Abdication by

implication should not be read into the CDA at all, let alone so easily.

B. 41 U.S.C. § 607(h)

While its approval of the OFPP's regulation rests principally upon a finding that the regulation advances the legislative purpose, the panel did purport to find additional authorization in 41 U.S.C. § 607(h), which is entitled "Procedural guidelines":

> Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority). 41 U.S.C. § 607(h)(1988).

Quoting this section, the panel held that OFPP's claim-certification regulation constituted "guidelines with respect to criteria for the . . . functions . . . of the agency boards . . ." that "may be necessary or desirable to carry out the provisions of this chapter. . . ." *Grumman Aerospace Corp.*, 927 F.2d at 578. As such, the panel found the regulation to be "clearly within the congressionally delegated authority" of the OFPP. *Id.* This cannot be. The panel equates the internal "functions" of the agency boards with the claim-certification requirement Congress imposed *on contractors*. Read this broadly, section 607(h) would authorize OFPP to issue regulations affecting any contractors' rights or responsibilities that may come before the agency boards, so long as the regulation

is deemed "necessary or desirable" to carry out the provisions of the law. Section 607(h), entitled "Procedural guidelines" and concerned with the "establishment, functions and procedures" of the agency boards, is neither an explicit nor implicit legislative delegation to rewrite the CDA.

The long and short of the panel's opinion seems to be that agencies may develop rules out of thin air so long as the legislature has not explicitly forbidden it, even though no statutory language or legislative history suggests that Congress meant to delegate such authority. The result in this case is a certification requirement that bears no discernible resemblance to the CDA and produces outcomes that Congress could not have intended.

II. THE OFPP'S CLAIM-CERTIFICATION REGULATION PROVIDES NO GUIDANCE TO CONTRACTORS AND, AS INTERPRETED, VIOLATES THE CDA

The central irony of the panel's opinion is that it finds Congress's use of the word "contractor" in the CDA to be ambiguous, justifying a regulation, while it finds that OFPP's regulation "is unambiguous and must be applied literally." *Grumman Aerospace Corp.*, 927 F.2d at 578. The opposite is the case. There is no evidence that Congress, in considering the CDA, found the long-standing principles of corporate agency to be ambiguous or otherwise insufficient for purposes of the claim-certification requirement. On a regular basis, corporations and other business organizations file myriad forms, reports, claims, notices, etc. pursuant to laws that do not specify which persons are to submit, sign, or certify. The CDA is but another statute in which Congress did not modify traditional principles. *Cf. Dimension Fin. Corp.*, 474 U.S. at 373

("Nothing in the statutory language or the legislative history, therefore, indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage."). While the panel finds a gap in the certification requirement, it cites no evidence of one.

It is the OFPP's decision to close the nonexistent gap that has created all the doubt. 48 C.F.R. § 33.207(c)(2) provides as follows:

> If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

The first prong of the regulation, specifying "[a] senior company official in charge at the contractor's plant or location involved" raises several questions. Who is a "senior" official? Is an "official" different from an employee or an officer? Of what must the official be "in charge" (the plant or location, the contract performance, performance of the disputed portion of the contract)? Which plant or location is "involved" (the one(s) where the contract was primarily performed, where the disputed portion of the contract was performed)?[3]

---

[3] 10 U.S.C. § 2410, discussed *supra*, raises essentially these same issues. The point is that the CDA neither raises them nor indicates that they are to have any place in the statutory framework.

The second prong of the regulation, specifying "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs," is no clearer. One fundamental question raised by this case is whether the panel has created a "CEO-only" rule by denying certifying status to GAC's senior vice-president and treasurer on the ground that he had "overall responsibility *for just* the contractor's financial affairs." *Grumman Aerospace Corp.*, 927 F.2d at 580 (emphasis added). The panel disputes this characterization, but offers only the observation that "any such requirement would read the first description out of the regulation." *Id.* This suggests that the second prong may indeed be a "CEO-only" rule, but the panel did not clarify: "We hold only that GAC has failed to establish . . . either requirement of the regulation." *Id.* at 581. The question remains whether more than one officer can be said to have "overall responsibility for the conduct of the contractor's affairs." This unsettled issue, combined with the unresolved questions concerning the first alternative, leaves contractors unable to ascertain their certification options.

There should be no disagreement that certification of a claim in excess of $50,000 is a serious act. Taxpayer funds and corporate revenues are at stake; personal and corporate liability loom heavily. These incentives and disincentives will influence contractors to seek certification by only those employees who can certify in good faith, with knowledge concerning the supporting data and the applicable law. As this case demonstrates, however, the factual and legal issues surrounding claims may be complex, perhaps to the point that senior company officials of corporations

that have numerous Government contracts exceeding $50,000 will be unable to certify claims. On the other hand, those who are in a position to certify based upon their actual knowledge will not, in many cases, fit either alternative of the regulation as it has been interpreted. It is difficult to conceive that Congress, by not defining further the term "contractor," intended to place corporations in this predicament. As stated by Judge Plager in dissent, the statute "does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures." *Id.* at 583.

In *Triax Co. v. United States*, 20 Cl. Ct. 507 (1990), the court accepted the proposition that 48 C.F.R. § 33.207 is unambiguous, as held in *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir. 1989). The panel in this case affirmed the absence of ambiguity in the regulation. But other portions of the *Triax* opinion are more illuminating:

> Accepting defendant's reading of the regulation would render it ambiguous; businessmen and businesswomen of average or even extraordinary intelligence would be forced to play a guessing game when deciding who should certify a claim.
>
> * * * *
>
> Clearly the drafters of section 33.207(c)(2) meant for there to be *at least one person* within every contractor's organization who can certify claims on behalf of the contractor.
>
> * * * *

> Reducing claim certification to the level of circulating a petition around the contractor's office cannot be what Congress intended. Moreover, forcing contractors to resort to such mass certification would be tantamount to saying that the regulation is hopelessly ambiguous, yet the Federal Circuit has explicitly stated otherwise.

Triax Co., 20 Cl. Ct. at 512,513 (emphasis in original) (footnotes omitted). Given that the regulation must be unambiguous, the *Triax* court held, "The government cites no case where a certification executed by a corporate officer was held invalid, and the Court declines to make this the first such case." *Id.* at 511. The panel's holding in this case that the certification executed by a corporate officer is invalid compels at least one conclusion: the regulation is ambiguous.

Amicus AIA submits that Congress delegated no authority to OFPP to define who could certify claims on behalf of a contractor. If any delegation were inferable, that delegation did not authorize a regulation that so substantively affects the rights of parties and that, when interpreted in individual cases, leaves the certification requirement beyond the comprehension of contractors, the boards of contract appeals, and the courts. The panel's decision mistakes agency usurpation for legislative delegation, thereby distorting essential separation-of-powers principles.

CONCLUSION

For the foregoing reasons, AIA respectfully requests that the petition be granted.

Respectfully submitted,

DUNAWAY & CROSS

MAC S. DUNAWAY
Counsel of Record

GARY E. CROSS
1146 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 862-9700

Attorneys for Amicus
Aerospace Industries
Association of America, Inc.

Dated: July 16, 1991

Supreme Court, U.S.
FILED
JUL 26 1991
OFFICE OF THE CLERK

No. 90-1800

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

Of Counsel:
ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAMES S. HOSTETLER
(Counsel of Record)
STEPHEN D. KNIGHT
BRIAN A. OCHS
TERRY SMITH
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for the Chamber of Commerce of the United States of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. THE QUESTION OF WHO MAY CERTIFY A CLAIM HAS SPAWNED MORE THAN A DECADE OF WASTEFUL LITIGATION, CONTRARY TO CONGRESS' INTENT	5
II. THE FEDERAL CIRCUIT DECISION IMPOSES UNDUE RISKS AND BURDENS ON CONTRACTORS, AND FIRMLY ESTABLISHES CERTIFICATION AS AN OBSTACLE, RATHER THAN AN EXPEDIENT, TO CLAIMS RESOLUTION	8
A. The Court Has Imposed A Restrictive And Unworkable Rule Which Is Divorced From The Realities Of Corporate Organization And Government Contracting	8
1. There May Be No Appropriate "Senior Company Official" to Certify under the Federal Circuit's Interpretation of FAR § 33.207(c)(2)(i)	9
2. Contractors Must Start the Process All Over Again If the "Wrong" Official Certifies	11
3. The Federal Circuit's Requirement That the CEO or Its Equivalent Certify under FAR § 33.207(c)(2)(ii) Is Unreasonable and Contrary to the Purposes of the CDA	13

TABLE OF CONTENTS—Continued

Page

B. The Court's Decision Places A Special Burden On The Large Number Of Small To Moderate-Sized Companies Which Sell To The Government 15

C. The Court's Decision Unfairly Penalizes Contractors Who Certified Claims According To Pre-Existing Legal Requirements 16

III. THE FEDERAL CIRCUIT DECISION CREATES STRONG DISINCENTIVES TO DOING BUSINESS WITH THE GOVERNMENT, CONTRARY TO CONGRESS' INTENT 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: Page

Al Johnson Constr. Co. v. United States, 19 Cl. Ct. 732 (1990) 8
Ball, Ball & Brossamer, Inc. v. United States, 878 F.2d 1426 (Fed. Cir. 1989) 11
Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986) 17
Bob Jones University v. United States, 461 U.S. 574 (1983) 6
Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 2
Brookfield Constr. Co. v. United States, 661 F.2d 159 (Cl. Ct. 1981) 12-13
Cox Constr. Co. v. United States, 21 Cl. Ct. 98 (1990) 9
Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983) 12
Grumman Aerospace Corp., ASBCA No. 34665, 90-1 BCA ¶ 22,417 (1989) 4
Ingalls Shipbuilding, Inc., ASBCA No. 38323, 91-2 BCA ¶ 23,904 (1991) 12, 16
KDH Corp. v. United States, 23 Cl. Ct. 34 (1991) .. 13
M.A. Mortenson Co., ASBCA No. 39978, 91-1 BCA ¶ 23,558 (1990) 8, 10
Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991) 8
McDonnell Aircraft Co., ASBCA No. 37346, 89-2 BCA ¶ 21,820 (1989) 7, 9
Newport News Shipbuilding and Dry Dock Co., ASBCA No. 33244, 91-2 BCA ¶ 23,865 (1991) 16
Northwest Marine, Inc., ASBCA No. 41702 (May 3, 1991) (Westlaw, FGC-BCA library) 16, 17
PCL Civil Constructors, Inc., ASBCA No. 41881, 91-2 BCA ¶ 23,906 (1991) 16
Peabody N.E., Inc., ASBCA No. 26410, 83-2 BCA ¶ 16,552 (1983) 7
Prism Constr. Co., ASBCA No. 42096 (May 21, 1991) (Lexis, PUBCON library) 16
R.J. Lanthier Co., ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991) 10, 16

TABLE OF AUTHORITIES—Continued

	Page
Reliance Insurance Co. v. United States, 23 Cl. Ct. 108 (1991)	12, 16
Sun Cal, Inc. v. United States, 21 Cl. Ct. 31 (1990)	7
Tracor, Inc., ASBCA No. 29912, 87-2 BCA ¶ 19,808 (1987)	7
Triax Co. v. United States, 20 Cl. Ct. 507 (1990)	6, 7, 9, 10
United States v. Grumman Aerospace Corp., 927 F.2d 575 (Fed. Cir. 1991)	*passim*
United States v. Newport News Shipbuilding and Dry Dock Co., 655 F. Supp. 1408 (E.D. Va. 1987)	2
United States v. Newport News Shipbuilding and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988)	2
United States v. Westinghouse Elec. Corp., 615 F. Supp. 1163 (W.D. Pa. 1985), *aff'd*, 788 F.2d 164 (3rd Cir. 1986)	2
W.M. Schlosser Co. v. United States, 705 F.2d 1336 (Fed. Cir. 1983)	11
Western Empire Constructors, Inc. v. United States, 20 Cl. Ct. 668 (1990)	7
Statutes:	
48 C.F.R. § 33.207(c)(2) (1990)	4
Contract Disputes Act of 1978 (1988)	
41 U.S.C. §§ 601-613	2
41 U.S.C. § 605(c)(1)	2
41 U.S.C. § 607(e)	3, 5
41 U.S.C. § 611	12
Federal Acquisition Regulation (FAR)	
§ 15.804	18
§ 33.207(c)(2)	4, 6, 9
§ 33.207(c)(2)(i)	4, 7, 8, 9
§ 33.207(c)(2)(ii)	5, 7, 8, 13
Part 52	18
§ 52.214-26	18
§ 52.215-1	18
§ 52.215-2	18

TABLE OF AUTHORITIES—Continued

Page

Pub. L. No. 101-189, § 824, 103 Stat. 1504, *reprinted in* 1989 U.S. Code Cong. & Admin. News 19
10 U.S.C. § 2306a(g) (1988) 18
31 U.S.C. § 3729 (1988) 18
41 U.S.C. § 254 (1988) 18
10 U.S.C.A. § 2325 note (West Supp. 1984-1990) 19
5 U.S.C. App. §§ 1-12 (1988) 18

Legislative Materials:

Contract Disputes Act of 1978: Hearings Before the H. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary on H.R. 3668, 98th Cong., 2d Sess. 134 (1984) 6, 14
Contract Disputes: Hearings Before the H. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary on H.R. 664 and Related Bills, 95th Cong., 1st Sess. 68 (1977) 15
Defense Contractor Whistleblower Act of 1989, Comments of the Chamber of Commerce on H.R. 2579, submitted to the House Committee on Armed Services (July 10, 1989) 2
General Services Administration Proposed Rule on "Procurement Integrity," Federal Acquisition Regulation (FAR) Case 89-23, Comments of the Chamber of Commerce (Apr. 26, 1989) 2
H.R. Rep. No. 331, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 977 19
Integrity of Department of Defense Acquisition System and Its Impact on U.S. National Security: Hearings Before the Full Comm. and the Acquisition Policy Panel, Comm. on Armed Services, 100th Cong., 2d Sess. 19 (1988) 14
S. Rep. No. 81, 101st Cong., 1st Sess. (1989) 19
S. Rep. No. 1118, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235 ..... 2, 5, 7, 19

TABLE OF AUTHORITIES—Continued

Other Authorities: Page

ASBCA Asks Selected Contractors to Address Adequacy of Certifications, 55 Fed. Cont. Rep. (BNA) 369 (Mar. 27, 1991) 16

DOD Fraud Investigations: Characteristics, Sanctions, and Prevention, GAO Report No. B-224759 (Jan. 20, 1988) 14

Gov't Prosecuting Fraud Cases Based on Conduct Once Viewed As 'Noncriminal', 44 Fed. Cont. Rep. (BNA) 536 (Sept. 16, 1985) 14

SEC Form 10-K of General Dynamics Corp. for the year ended December 31, 1990 9

Shirk, Greenberg & Dawson, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts*, 37 Cath. U.L. Rev. 935 (1988) 14

The State of Small Business: A Report of the President Transmitted to the Congress 1990 (GPO Publ. 1990) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1800

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

With the written consent of the parties,[1] the Chamber of Commerce of the United States (the "Chamber") respectfully submits this brief *amicus curiae* in support of the petition of Grumman Aerospace Corporation ("Grumman") for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991).

INTEREST OF THE *AMICUS CURIAE*

As the nation's largest federation of business and professional organizations, the Chamber represents over 180,000 companies, many of which provide goods and services to the United States through the federal procurement process. The Chamber routinely represents the interests of these members before the courts, Congress and

---

[1] Letters of consent are on file with the Clerk of the Court.

the regulatory agencies on a wide variety of federal procurement issues of national significance.[2]

The question presented to the Court in this case—who may certify a claim under the Contract Disputes Act—critically affects all companies, large and small, that do business with the federal government. On behalf of a large cross section of these companies, the Chamber respectfully submits this brief to apprise the Court of the practical harms wrought by the Federal Circuit in the decision below.

The purpose of the Contract Disputes Act of 1978 (the "Act" or "CDA"), 41 U.S.C. §§ 601-613 (1988), was to establish an expeditious and even-handed system of legal and administrative remedies for government contract claims. S. Rep. No. 1118, 95th Cong., 2d Sess. 1, 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235 (hereinafter cited as "S. Rep."). For contractors, the entry point to this system is the requirement that "the contractor" certify claims over $50,000. 41 U.S.C. § 605 (c) (1).[3] Since the passage of the Act, the government has

---

[2] *See Amicus* briefs filed in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (No. 86-492) (military contractor defense), *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163 (W.D. Pa. 1985) (No. 11710), *aff'd*, 788 F.2d 164 (3rd Cir. 1986) (authority to subpoena records), *United States v. Newport News Shipbuilding and Dry Dock Co.*, 655 F. Supp. 1408 (E.D. Va. 1987) (No. 86-182-NN), and *United States v. Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988) (No. 87-3832) (access to internal audit reports). *See also Defense Contractor Whistleblower Act of 1989*, Comments of the Chamber of Commerce on H.R. 2579, submitted to the House Committee on Armed Services (July 10, 1989); *General Services Administration Proposed Rule on "Procurement Integrity," Federal Acquisition Regulation (FAR) Case 89-23*, Comments of the Chamber of Commerce (Apr. 26, 1989).

[3] Section 605(c)(1) provides in relevant part: "For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."

seized upon this requirement to block contractors at the door, raising interminable questions and challenges over who may certify. Contractors have thus been forced to spend inordinate time and resources litigating a matter which Congress intended to be straightforward. With its decision in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), the Federal Circuit now stands four-square in support of this approach, which deprives government contractors of the salutary effect of the statute.

The decision below has had an ambush-like effect on the government contracts industry and threatens the ability of contractors to transact business with the Government on equitable terms and without being subject to quixotic litigation. The Federal Circuit's holding that Petitioner's Senior Vice President and Treasurer did not qualify under the Act to certify a claim denies business realities, and has left contractors mystified as to who, besides a corporate contractor's CEO, may safely certify. The court's holding places at risk government contractors' statutory right to "expeditious and inexpensive resolution of disputes" (*see* 41 U.S.C. § 607(e)), for contractors who guess wrong must re-start the claims resolution process—possibly after years of litigation—and forfeit the statutory interest to which they are entitled.

The Chamber's government contractor members will incur substantial financial loss and will be deterred from doing business with the Government if *Grumman* remains the law. In light of its strong interest in the outcome of this case, the Chamber urges this Court to grant Grumman's petition for review.

STATEMENT OF THE CASE

This case arises out of the Federal Circuit's determination that a senior corporate officer who was "among the most knowledgeable and responsible in assessing . . . a claim"[4] was not qualified to certify that claim on be-

[4] *Grumman*, 927 F.2d at 583 (Plager, J., dissenting).

half of the corporation under the CDA. Specifically, the court held that the officer who served as 1) Treasurer of Grumman Aerospace Corporation, and 2) Senior Vice President Finance of the Aircraft Systems Division of the parent Grumman Corporation, and who 3) exercised overall responsibility for Grumman's financial affairs[5] was not qualified to certify a claim relating to employee compensation costs.

The court premised its conclusion on an interpretation of a regulation issued by the Office of Federal Procurement Policy ("OFPP") which purports to implement the certification requirement of the CDA. That regulation, Federal Acquisition Regulation (FAR) § 33.207(c)(2),[6] provides:

> If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

With respect to the first prong of the regulation, the court required that a certifier must (a) have primary responsibility for executing the contract, (b) be physically present at the location of primary contract activity, and (c) not report to *anyone*, especially with regard to the filing of the claim. *Grumman*, 927 F.2d at 580. Although the court found that Grumman's Senior Vice President and Treasurer was a senior company official, it concluded that he did not qualify under § 33.207(c)(2)(i) because he reported to another officer within Grumman's organization and because there was no evidence that he was physically present at the site of contract performance.

---

[5] *Grumman Aerospace Corp.*, ASBCA No. 34665, 90-1 BCA ¶ 22,417 at 112,601 (1989).

[6] 48 C.F.R. § 33.207(c)(2) (1990).

The court below further concluded that Grumman's certifier did not have overall responsibility for the contractor's affairs under § 33.207(c)(2)(ii) because he was only responsible for Grumman's financial affairs. *Id.* Thus, over strong dissent, the court dismissed Grumman's claim, forcing Grumman to re-start a claims resolution process that had lasted nearly five years to the date of the Federal Circuit's decision and to forfeit its statutory interest. The court recognized that the purpose of the CDA certification requirement is to discourage the submission of unwarranted claims (*see id.* at 579), but did not suggest that permitting Grumman's Senior Vice President and Treasurer to certify would have defeated this purpose.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHO MAY CERTIFY A CLAIM HAS SPAWNED MORE THAN A DECADE OF WASTEFUL LITIGATION, CONTRARY TO CONGRESS' INTENT.

The purpose of the CDA was to establish a fair, equitable and efficient system for the resolution of government contract disputes. S. Rep. at 1, 4. Congress sought to eliminate "executive branch fiat"; to "broaden[] the scope of remedies available to the contractor"; and to tear down "artificial" barriers which could defeat contractor claims. *Id.* at 2, 12, 19. A more expeditious process was essential in Congress' view because "[t]he way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business." *Id.* at 4. To this end, the Act requires that an agency board provide "expeditious and inexpensive resolution of disputes." 41 U.S.C. § 607(e).

Consistent with these purposes, Congress was concerned that the submission of unwarranted claims "protracts disputes and clouds the true issue in a case." S. Rep. at 7. Certification was intended to deter the submission of unwarranted claims. *Grumman*, 927 F.2d at 579. Thus,

in the context of Congress' overall scheme, certification served as an expedient—not an obstacle—to the resolution of claims. Congress surely did not intend through the certification requirement to retract the benefits of equity and efficiency that the Act as a whole was meant to confer. *See Triax Co. v. United States*, 20 Cl. Ct. 507, 512 n.5 (1990) (interpreting CDA certification requirement with view toward "avowed purpose of the Contract Disputes Act . . . to foster the prompt, efficient resolution of disputes between contractors and the government"). *See also Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) (particular clause of a statute must be interpreted in light of the whole statute and in view of Congress' policy concerns).

Indeed, in 1984 congressional hearings on the CDA, the Department of Justice ("DOJ") and the Department of Defense ("DOD") strongly defended the certification requirement as being essential to the efficient and expeditious resolution of government contract claims. These agencies argued that certification eliminated "gamesmanship" and "posturing" from the claims process; prevented a "guessing-game"; and promoted "more timely" and "swifter" resolution of contract disputes. *See Contract Disputes Act of 1978: Hearings Before the H. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary on H.R. 3668*, 98th Cong., 2d Sess. 134, 161, 173, 218 (1984) (hereinafter cited as "*1984 Hearings*"). The DOJ and DOD assured Congress, moreover, that substantial certification-related litigation was "largely behind us." *Id.* at 134, 227.

The agencies did not give enough credit to the creativity of their own lawyers. For the past 12 years, claims certication has engendered exactly the protracted, superfluous litigation Congress sought to avoid. The vehicle for this abuse has not been the CDA—which permits "the contractor" to designate who will speak for it—but the regulation which purports to implement the statute, FAR § 33.207(c)(2). Agencies have seized on the regulation

to erect preliminary obstacles to contractor claims.[7] The focus of this litigation has not been whether claims were inflated or unwarranted, as was Congress' concern. Rather, the cases evidence a byzantine process of second-guessing over who should sign for the company.

This kind of bureaucratic "gamesmanship" is the antithesis of the fair and efficient dispute resolution system which Congress intended to establish and which the Executive branch, in 1984, assured Congress certification would promote. Moreover, this litigation sideshow disregards Congress' concern in enacting the CDA that "the Government has limited resources that can be devoted to the resolution of claims disputes." S. Rep. at 8.

Congress could not have expected nor intended that the straightforward certification requirement it enacted would become a source of collateral litigation having

---

[7] *See, e.g., Triax Co. v. United States*, 20 Cl. Ct. at 513 (Government argued that *all* management-level personnel should sign off on a certified claim, which would ensure that at least one signatory would be the proper individual); *Western Empire Constructors, Inc. v. United States*, 20 Cl. Ct. 668, 671 (1990) (Despite the fact that its interpretation would render the two parts of the regulation indistinguishable, government argued that under section (i) of the regulation, the certifier must be either an equity owner, director, or officer of the contracting entity); *Sun Cal, Inc. v. United States*, 21 Cl. Ct. 31, 34 (1990) (Although contractor's President validly delegated authority to Vice President pursuant to by-laws, government argued that Vice President could not certify claim as an officer having overall responsibility for contractor's affairs); *McDonnell Aircraft Co.*, ASBCA No. 37346, 89-2 BCA ¶ 21,820 (1989) (Government, without evidentiary support, contended that Vice President and Controller of the contractor was not an officer having overall responsibility for contractor's affairs and thus could not certify a claim under FAR § 33.207(c)(2)(ii)); *Tracor, Inc.*, ASBCA No. 29912, 87-2 BCA ¶ 19,808 (198[illegible] (Government argued that Tracor's Director of Contracts could not properly certify claim); *Peabody N.E., Inc.*, ASBCA No. 26410, 83-2 BCA ¶ 16,552 (1983) (Government, under Department of Defense provision identical to FAR § 33.307(c)(2)(i), unsuccessfully argued that certification by the *Presidents* of the contractor *and* subcontractor did not constitute certification by authorized individuals).

nothing to do with the requirement's objective of preventing unwarranted claims. The Federal Circuit's decision in *Grumman* is a zenith in this process. This Court's intervention is necessary to restore the fair and efficient system Congress intended to create. Twelve years of mindless litigation is enough.

II. THE FEDERAL CIRCUIT DECISION IMPOSES UNDUE RISKS AND BURDENS ON CONTRACTORS, AND FIRMLY ESTABLISHES CERTIFICATION AS AN OBSTACLE, RATHER THAN AN EXPEDIENT, TO CLAIMS RESOLUTION.

A. The Court Has Imposed A Restrictive And Unworkable Rule Which Is Divorced From The Realities Of Corporate Organization And Government Contracting.

Despite the extremes to which agencies have gone to get claims dismissed on certification grounds, the pre-*Grumman* case law generally adopted a reasonable approach. Consistent with the CDA's requirement that the "contractor" certify, the cases permitted certification by a broad class of persons who could be deemed to speak for the contractor. Thus, the determination of whether a certifying individual was "a senior company official" within the meaning of FAR § 33.207(c)(2)(i) was based largely on the individual's authority to certify the claim. *See, e.g., M.A. Mortenson Co.*, ASBCA No. 39978, 91-1 BCA ¶ 23,558 (1990) (certification valid where certifier was authorized to, and did, execute modifications to the contract); *Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 738 (1990) (finding certification invalid because certifying individual was not authorized to make the certification); *Manning Elec. & Repair Co. v. United States*, 22 Cl. Ct. 240, 244 (1991) (claim properly certified where project manager had "full contract authority to bind the company").

Similarly, with regard to § 33.207(c)(2)(ii), the boards and Claims Court held that a contractor's cor-

porate officers presumptively have overall responsibility for the contractor's affairs. *See, e.g., Triax Co.*, 20 Cl. Ct. at 511. *See also McDonnell Aircraft Co.*, 89-2 BCA ¶ 21,820 (Vice President and Controller of the contractor held to be an officer with overall responsibility for contractor's affairs).[8]

The Federal Circuit's decision in *Grumman* departs dramatically from this reasonable approach, adopting instead a restrictive interpretation of FAR § 33.207(c)(2) that does not comport with the myriad ways companies may be organized or contracts administered.

1. *There May Be No Appropriate "Senior Company Official" to Certify under the Federal Circuit's Interpretation of FAR § 33.207(c)(2)(i).*

Under the Federal Circuit's construction of § 33.207 (c)(2)(i), the certifying "senior company official in charge" at the plant or location involved must (a) have primary responsibility for executing the contract, (b) be physically present at the location of primary contract activity, and (c) not report to anyone, in particular with regard to the filing of the claim. 927 F.2d at 580. The court's equation of "in charge" with not reporting to anyone restricts certification to whomever is in overall operational command of the relevant facility. The difficulties with the court's interpretation are manifold.

A contractor, for example, may be organized into several different divisions, with each division performing under a number of contracts. Each division, further, may have facilities at several sites.[9] The only person who is

---

[8] Indeed, some courts, recognizing that certification is not an end in itself but is instead a check on inflated claims, held that where there is no showing that a contractor is attempting to escape potential liability, strict compliance with the certification regulation is unnecessary. *Cox Constr. Co. v. United States*, 21 Cl. Ct. 98, 102 (1990).

[9] *See, e.g.*, SEC Form 10-K of General Dynamics Corp. for the year ended December 31, 1990, pp. 1-12.

"in charge" of a division's facility in the sense of not reporting to anyone is the manager or executive who oversees the division. (Even that person, of course, would report further up the corporate ladder.) The division manager, however, could not be located at all of the facilities, and may not be located at any of them. *See, e.g., R.J. Lanthier Co.*, ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991) (contractor's Operations Manager, although "a senior company official" with "responsibility for *all* . . . field office operations", was located in contractor's home office rather than the field office set up to execute the contract) (emphasis supplied). Further, the division manager would likely have broad managerial responsibilities, and would not have "primary responsibility" for executing any single contract.

Conversely, the person "in charge" at the relevant facility may not qualify as a "senior company official." *See M.A. Mortenson Co.*, 91-1 BCA ¶ 23,558 (citing cases to illustrate the confusion among the boards and within the Claims Court as to whether on-site Project Managers are senior company officials). Even if a person on site is "in charge" and qualifies as a senior company official, he may not have "primary responsibility for execution of the contract." That role may fall to a program manager, contracts representative, or director of contracts who may, of course, "report to" the executive in charge of the facility.

The question of what is the site of "primary contract activity" has its own special problems. For instance, the site of primary contract activity is unclear where the contractor certifies its claim after demobilizing its workforce at the location where the contract was executed. *See, e.g., Triax Co.*, 20 Cl. Ct. at 512 n.6 (suggesting that when the contractor demobilizes its work force prior to certification, its home office may be considered the "location involved").

Moreover, the administration of government contracts may take almost unlimited forms. It may be unclear which of a number of sites performing under a contract would be considered the site of "primary contract activity." For example, which is the site of "primary activity" when one facility negotiates a contract, signs it, and performs all assembly and shipment to the customer, but a different facility manufactures 90% of the parts? If a contract is for development work, is the site of "primary activity" the laboratories where the computer models are generated, or the test range where the prototype is tested? These types of questions are not susceptible to clear-cut answers. Yet, under the Federal Circuit's approach, the contractor must find the *one* "right" official to certify a claim.

The Federal Circuit's interpretation of the first prong of the regulation thus assumes that a contract is performed at one facility which is headed by a qualified senior official who has direct knowledge of and responsibility for the contract. By superimposing this restrictive paradigm on the multifarious corporate structures of government contractors, the court has engendered more confusion than clarity. In deciding who should certify a claim, contractors are forced to play a guessing-game where, as described below, the penalty for guessing wrong can be dismissal and loss of interest after years of litigation.

2. *Contractors Must Start the Process All Over Again If the "Wrong" Official Certifies.*

Because the Federal Circuit has held the Act's certification requirement to be jurisdictional, once a claim is found to be improperly certified, all proceedings concerning that claim are nullified and the contractor must begin the claims process again. *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983). Viewed as a question of subject mat-

ter jurisdiction, improper certification can be raised at any time. *Grumman*, 927 F.2d at 580. The contractor is thus placed at enormous risk because its claim can be dismissed after years of expensive and time-consuming litigation.[10]

The potential for abuse in this process is manifest. The government can delay payment of valid claims interminably by ambushing the contractor with an improper certification argument at the end of lengthy proceedings and, if successful, force the contractor to start all over again. This turns the CDA on its head, establishing a carousel of litigation rather than the fair and efficient system which Congress intended.

Further, because the Federal Circuit has held that no interest begins to accrue until a claim is properly certified,[11] forcing the contractor to start the dispute resolution process anew deprives the contractor of the statutory interest to which it is entitled under the Act.[12] This effect is particularly ironic in light of Congress' expectation that the allowance of interest would provide inducement to *expedite* final disposition of claims. *See Brook-*

---

[10] *See, e.g., Grumman*, 927 F.2d 577 (claim filed in 1987 and dismissed more than four years later, after board proceeding and appeal, because purportedly signed by wrong official); *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323, 91-2 BCA ¶ 23,904 (1991) (claims certified in July of 1987, but government did not challenge certification until 1989; claims dismissed in 1991); *Reliance Insurance Co. v. United States*, 23 Cl. Ct. 108 (1991) (certification in April of 1986; government did not challenge certification until 1990; claim dismissed in 1991).

[11] *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983).

[12] "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof." 41 U.S.C. § 611.

field Constr. Co. v. United States, 661 F.2d 159, 164-65 (Cl. Ct. 1981).

3. *The Federal Circuit's Requirement that the CEO or Its Equivalent Certify under FAR § 33.207 (c)(2)(ii) Is Unreasonable and Contrary to the Purposes of the CDA.*

If contractors wish to avoid "guessing" who is the correct "senior company official" under the Federal Circuit rule, they must resort to FAR § 33.207(c)(2)(ii), which provides for certification by "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." The Federal Circuit found that Grumman's Senior Vice President and Treasurer was not such an officer because he was responsible for only the contractor's financial affairs. 927 F.2d at 580-81. Thus, "[a]fter *Grumman* . . . [only the] chief executive officer, or one of equivalent status," will satisfy the second prong of the regulation. *KDH Corp. v. United States*, 23 Cl. Ct. 34, 42 (1991).[13] For a number of reasons, this approach is unworkable and at odds with the CDA.

First, the Federal Circuit's interpretation requires certification by an individual who is unlikely to have first-hand knowledge of the claim. The result is a *lessening* of corporate responsibility for the contents of claims, a consequence contrary to what Congress intended.

Second, and relatedly, CDA certifications have often provided the basis for civil and criminal actions against

---

[13] The Federal Circuit denied that it required certification by the CEO on the grounds that the correct "senior company official" could also certify under the first prong of the regulation. 927 F.2d at 581. The court's analysis made clear, however, that, under the second prong of the regulation, only a CEO, or its equivalent, may certify.

government contractors.[14] Certifications are especially important to criminal prosecutions because they help establish a statement, individual responsibility for that statement, and intent.[15] In an era of increasing criminalization of the procurement process,[16] it is unreasonable and unfair to require certification by officers who do not have direct knowledge of a claim.

Third, a "CEO or equivalent" rule imposes an unwarranted administrative burden on contractors. For companies with numerous contracts and disputes, the rule requires an officer at the highest level to take large amounts of time away from running the company in order to study potential claims in depth and be in a position to sign a certification. There is no basis in the CDA or in logic for a rule which prevents reasonable delegations of authority consistent with the contractor's by-laws or other governing provisions.

---

[14] *See 1984 Hearings* at 217.

[15] *Id.* at 218.

[16] *See Integrity of Department of Defense Acquisition System and Its Impact on U.S. National Security: Hearings Before the Full Comm. and the Acquisition Policy Panel, Comm. on Armed Services,* 100th Cong., 2d Sess. 19 (1988) (testimony of R. James Woolsey, member, Packard Commission) (noting increased number of criminal prosecutions of government contractors); *Gov't Prosecuting Fraud Cases Based on Conduct Once Viewed as 'Noncriminal'*, 44 Fed. Cont. Rep. (BNA) 536 (Sept. 16, 1985) (reporting remarks by then United States Attorney for the Eastern District of Virgina); *DOD Fraud Investigations: Characteristics, Sanctions, and Prevention,* GAO Report No. B-224759, pp. 3-4 (Jan. 20, 1988) (reporting that DOD investigators more than doubled the number of procurement fraud investigations between 1983 and 1986); Shirk, Greenberg & Dawson, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts,* 37 Cath. U.L. Rev. 935 (1988) (discussing "the vulnerability of government contractors to the web of civil and criminal liability for defective pricing and [the] significantly expanded . . . scope of that liability").

B. The Court's Decision Places A Special Burden On The Large Number Of Small To Moderate-Sized Companies Which Sell To The Government.

Small businesses account for a substantial portion of the products and services supplied to the Government each year.[17] The legislative history of the CDA reveals that Congress was concerned that small businesses were deterred from doing business with the Government for fear that if a dispute arose their remedy would be cumbersome and expensive.[18]

Yet the Federal Circuit's ruling falls perhaps most harshly on small contractors. As the dissent in *Grumman* observed:

> The Government's position . . . sets a trap for the unwary, requiring that claims falling short of its technical trap be re-started, thus giving the Government more years to avoid paying its just debts, if they are ultimately found to be just, and to deny the contractor the interest on the money due that the statute requires be paid.
>
> * * * *
>
> *It is the small companies who seldom do business with the Government and who can least afford delayed payments with no interest paid for the delay, who likely will be caught and most hurt by this construction of the regulation.* This court should not countenance any such distortion of the remedial purposes of the Contract Dispute Act.

---

[17] Generally, in the area of government contracts, a business is considered small if it has less than 500 employees. *The State of Small Business: A Report of the President Transmitted to the Congress 1990*, p. 188 n.1 (GPO publ. 1990). In Fiscal Year 1988, small businesses provided approximately one-third of the $194.9 billion in goods and services contracted for by the Government. *Id.* at 187-88.

[18] *See Contract Disputes: Hearings Before the H. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary on H.R. 664 and Related Bills*, 95th Cong., 1st Sess. 68 (1977) (comments of Congressman Kindness on H.R. 3745).

927 F.2d at 583 (Plager, J., dissenting) (emphasis added).

C. The Court's Decision Unfairly Penalizes Contractors Who Certified Claims According To Pre-Existing Legal Requirements.

The effects of the *Grumman* decision are neither hypothetical nor overstated. In light of *Grumman*, the Armed Services Board of Contract Appeals has begun a comprehensive review of pending cases to determine if dismissals for improper certification are required. *See ASBCA Asks Selected Contractors to Address Adequacy of Certifications*, 55 Fed. Cont. Rep. (BNA) 369-70 (Mar. 25, 1991). At least seven cases have already been dismissed, many of them after years of litigation.[19]

The cases applying *Grumman* have already demonstrated the irrational results that flow from the Federal Circuit's decision. For example:

- In *Reliance Insurance Co. v. United States*, 23 Cl. Ct. 108 (1991), an Assistant Vice President's certification was held improper although he was specifically authorized by the company to initiate prosecution of contract claims and to pay or compromise claims, and notwithstanding that his authority in connection with claims arising out of his region had no upper dollar limit.
- In *R.J. Lanthier Co.*, ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991), the certifying individual, appellant's Operations Manager, was responsible for all home office and field office operations and reported directly to the President. Because the certifier was

---

[19] *See Reliance Insurance Co. v. United States*, 23 Cl. Ct. 108 (1991); *Newport News Shipbuilding and Dry Dock Co.*, ASBCA No. 33244, 91-2 BCA ¶ 23,865 (1991); *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323, 91-2 BCA ¶ 23,904 (1991); *R.J. Lanthier Co.*, ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991); *PCL Civil Constructors, Inc.*, ASBCA No. 41881, 91-2 BCA ¶ 23,906 (1991); *Northwest Marine, Inc.*, ASBCA No. 41702 (May 3, 1991) (Westlaw, FGC-BCA library); *Prism Constr. Co.*, ASBCA No. 42096 (May 21, 1991) (Lexis, PUBCON library).

not physically present at the contractor's *ad hoc* field office, however, his certification was held improper and the contractor's claim was dismissed.

- In *Northwest Marine, Inc.*, ASBCA No. 41702 (May 3, 1991) (Westlaw, FGC-BCA library), the Board held that a contractor's Vice President and General Manager could not certify, notwithstanding that he 1) was a senior company official, 2) had a physical presence at the job site, and 3) possessed "unlimited authority" to bind the contractor, because the company's President was also actively involved in the project at issue.

The *Grumman* decision has thus injected chaos into a critical portion of the procurement process where Congress intended to create equity, efficiency, and balance. Where regulations have been applied so as to eviscerate the intent of the very statutes on which they are based, this Court has appropriately stepped in to restore the intent of Congress. *See, e.g., Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

III. THE FEDERAL CIRCUIT DECISION CREATES STRONG DISINCENTIVES TO DOING BUSINESS WITH THE GOVERNMENT, CONTRARY TO CONGRESS' INTENT.

A major purpose of the CDA was to encourage companies to compete for government business. The Federal Circuit decision has exactly the opposite effect.

A company which chooses to sell to the government already must find its way through a broad spectrum of statutory and regulatory obstacles. Acquisition regulations comprise seven volumes in the Code of Federal Regulations. Government contractors assume numerous burdens not encountered in the commercial sector. For example:

- Subject to certain exceptions and threshold requirements, on all contracts other than those using sealed-

bid procedures, contractors must provide the government with data supporting the costs that are anticipated in the contract, and the price proposed. This requirement is stated in terms of the contractor's obligation to disclose all "cost or pricing data"—*i.e.*, "all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly." 10 U.S.C. 2306a(g) (1988); *see also* 41 U.S.C. § 254 (1988); FAR § 15.804.

- Contractors are subject to extensive and often overlapping audit requirements. Contracting agencies perform audits with regard to contract costs claimed or incurred and cost or pricing data submitted. *See* FAR §§ 52.214-26, 52.215-2. Agency Inspectors General audit contractors pursuant to their overall authority to audit agency operations and programs. *See* 5 U.S.C. App. §§ 1-12 (1988). The standard "Examination of Records by the Comptroller General" clause grants the General Accounting Office audit rights over negotiated contracts in excess of $10,000. FAR § 52.215-1.

- Regulations require the insertion in government contracts of voluminous standard clauses, many subject to particular interpretations developed through years of regulatory and case law evolution. *See* FAR Part 52.

- As noted above, government contractors are increasingly subject to civil and criminal sanctions. In the commercial sector, a contract dispute is a contract dispute. For government contractors, however, the prospect of criminal prosecution and treble damages for civil fraud (31 U.S.C. § 3729 (1988)) always lies just over the horizon.

While companies whose products can only be used by the government (*e.g.*, military hardware) may be captives of this system, providers of commercial products and serv-

ices are not. Thus, Congress, determined to encourage more commercial companies to sell to the government, recently enacted legislation requiring that the Department of Defense develop simplified contracts for commercial products and that cost or pricing data requirements be reduced.[20]

The CDA was similarly intended to effect a departure from the unusual burdens visited upon government contractors. Congress hoped to encourage companies to do business with the government by providing a "fair, balanced," "equitable," and "efficient" dispute resolution system. S. Rep. at 1, 4. Such a system was necessary, Congress found, because "[t]he way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business." *Id.* at 4.

In the hands of the agencies and the Federal Circuit, however, the portal to this system—the certification requirement—has become yet another arcane and burdensome rule imposed on contractors. Certification under the terms of the OFPP regulation is now an obstacle to claims resolution. This can only further discourage companies from competing for government business, a result at odds with what Congress intended when it enacted the CDA, and still intends today.

---

[20] *See* Pub. L. No. 01-189, § 824, 103 Stat. 1504, *reprinted in* 1989 U.S. Code Cong. & Admin. News; 10 U.S.C.A. § 2325 note (West Supp. 1984-1990); H.R. Rep. No. 331, 101st Cong., 1st Sess. 612-13, *reprinted in* 1989 U.S. Code Cong. & Admin. News 977, 1069-70; S. Rep. No. 81, 101st Cong., 1st Sess. 194-97 (1989).

CONCLUSION

For all of the foregoing reasons, the Chamber urges that the writ sought by Grumman's petition be granted.

Respectfully submitted,

Of Counsel:
ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAMES S. HOSTETLER
(Counsel of Record)
STEPHEN D. KNIGHT
BRIAN A. OCHS
TERRY SMITH
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for the
Chamber of Commerce of the
United States of America

FILED
JUL 29 1991
OFFICE OF THE CLERK

No. 90-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

THE FEDERAL CIRCUIT BAR ASSOCIATION BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, GRUMMAN AEROSPACE CORPORATION

OF COUNSEL:

CYRUS E. PHILLIPS, IV
McGUIRE, WOODS, BATTLE & BOOTHE
Suite 1000
1627 Eye Street, N.W.
Washington, D.C. 20006

CLARENCE T. KIPPS, JR.
(Counsel of Record)
MILLER & CHEVALIER, CHARTERED
Metropolitan Square
Suite 900
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Amicus Curiae, The Federal Circuit Bar Association

July 29, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE AMICUS AND ITS INTERESTS	1
REASONS FOR GRANTING THE WRIT	4
I. The Court of Claims' and Federal Circuit's Decisions That Certification of Claims Is Jurisdictional Hinder the Administration of Justice.	4
II. The Jurisdictions of the United States Claims Court and the Boards of Contract Appeals Is Not Dependant Upon the Certification of the Underlying Claim.	8
III. FAR 33.207(c)(2) Is Invalid Because It Conflicts with the Plain Language and Express Purpose of the Statute It Purports To Interpret.	15
IV. A Decision Overruling Lehman Could Be Limited To Prospective Application.	17
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	Page
A. P. Green Export Company v. United States, 284 F.2d 383 (Ct. Cl. 1960)	17
Allen v. Hardy, 478 U.S. 255 (1986)	17
Allied Painting & Decorating Co., ASBCA No. 42496 (June 10, 1991)	5
Batson v. Kentucky, 476 U.S. 79 (1986)	17
Boeing Co. v. United States, 680 F.2d 132 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1081 (1983)	18
Buckley v. Valeo, 424 U.S. 1 (1976)	18
Clark Mechanical Contractors v. United States, 12 Cl. Ct. 415 (1987)	7,8
Harbert Int'l, Inc., ASBCA Nos. 41144, 41571 (June 25, 1991)	4
JAYCOR, ASBCA No. 40911 (June 10, 1991)	5
Lake Shore, Inc., ASBCA No. 42578 (June 11, 1991)	5
Newport News Shipbuilding and Dry Dock Co., ASBCA No. 33244 (June 26, 1991)	4
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	17
Paul E. Lehman, Inc. v. United States, 673 F.2d 352 (Ct. Cl. 1982)	11,12
Placeway Construction Corp. v. United States, 920 F.2d 903 (Fed. Cir. 1990)	7
Sademi Joint Venture, ASBCA No. 41025 (June 4, 1991)	5
Service Engineering Co., ASBCA No. 33787 (June 3, 1991)	5
Skelly and Loy v. United States, 685 F.2d 414 (Cl. Ct. 1982)	5
Solem v. Stumes, 465 U.S. 638 (1984)	17

Table of Authorities Continued

	Page
Union Boiler Works, Inc., ASBCA Nos. 41857, 41858, 41860 (June 27, 1991)	4
United States v. Grumman Aerospace Corp., 927 F.2d 575 (Fed. Cir. 1991)	*passim*
United States v. W.H. Moseley Co., 730 F.2d 1472 (Fed. Cir. 1984)	6,7
W.H. Moseley Co. v. United States, 677 F.2d 850 *cert. denied*, 459 U.S. 836 (1982)	6
William L. Crow Constr. Co., ASBCA Nos. 40998, 41508 (June 14, 1991)	5
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)	13,14

Statutes:

10 U.S.C. § 2405	3
Contract Disputes Act of 1978,	
41 U.S.C. §§ 601-613	2,8
41 U.S.C. § 605(a)	9
41 U.S.C. § 605(b)	9
41 U.S.C. § 605(c)(1)	*passim*
41 U.S.C. § 606	6,10,15
41 U.S.C. § 607(d)	10,14
41 U.S.C. § 609	6
28 U.S.C. § 1491	10
28 U.S.C. § 1491(a)(2)	11,14

Regulations:

Federal Acquisition Regulation Subpart 33.207(c)(2), 48 C.F.R. Ch. 1 (1990)	*passim*

Table of Authorities Continued

	Page
Legislative Materials:	
Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613)	2,8
§ 2(4), 92 Stat. 2383	15
§ 6(c)(1), 92 Stat. 2385	8
Federal Courts Improvements Act of 1982, Pub. L. No. 97-164 92 Stat. 25	9
H.R. Rep. No. 1556, 95th Cong., 2d Sess. (1978)	9
S. Rep. No. 1118, 95th Cong., 2d Sess., *reprinted* in 1978 *U.S. Code Cong. & Admin. News* 5235	9
124 Cong. Rec. 31,641-46 (1978)	12
124 Cong. Rec. 36,261-68 (1978)	12
124 Cong. Rec. 37,074-76 (1978)	12,13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1800

GRUMMAN AEROSPACE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

THE FEDERAL CIRCUIT BAR ASSOCIATION BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, GRUMMAN AEROSPACE CORPORATION

The Federal Circuit Bar Association, with the consent of all parties, submits this brief *amicus curiae* pursuant to Rule 37.2 of the Rules of this Court in support of the petition for a writ of certiorari filed by Grumman Aerospace Corporation.

THE AMICUS AND ITS INTERESTS

The Federal Circuit Bar Association is a national organization with over 1,700 members. Its primary purpose is to improve and facilitate the administration

of justice in the United States Court of Appeals for the Federal Circuit.

Members of The Federal Circuit Bar Association are directly affected by *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991). The decision has generated enormous confusion regarding fundamental issues of the jurisdiction of the Court of Appeals for the Federal Circuit, the United States Claims Court and the agency Boards of Contract Appeals to hear and decide disputes pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. The decision will serve only to increase the time and expense of litigation without any offsetting benefit to the administration of justice.

The *Grumman* panel has held that Federal Acquisition Regulation (FAR) 33.207(c)(2), 48 C.F.R. Ch. 1 (1990), a procurement regulation that purports to describe the persons who may properly certify non-individual contractor claims, is a reasonable explication of the certification requirements of section 6(c)(1) of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 2385 (codified at 41 U.S.C. § 605(c)(1)) (the "Act"). The *Grumman* panel viewed the certification requirements of the Contract Disputes Act as incomplete, and FAR 33.207(c)(2) as filling the legislative gap. *Grumman*, 927 F.2d at 578-79. In so holding, the *Grumman* panel disregarded the plain meaning of the Contract Disputes Act and the express intent of Congress in enacting that statute.

The *Grumman* decision has had a devastating impact on pending cases. The Armed Services Board of Contract Appeals has *sua sponte* directed parties to review the certifications in more than one hundred

cases. Numerous motions to dismiss based on *Grumman* are being filed before agency boards, the Claims Court, and in the United States Court of Appeals for the Federal Circuit. Many of these claims and cases have already been pending for many years. Indeed, in some cases, the jurisdiction of the forum is being challenged for the first time after trial. Government contractors and the Bar cannot be sure whether claim certifications submitted months, or even years ago, will be considered proper, or will be challenged on jurisdictional grounds.

The *Grumman* panel refused to revisit its earlier decisions holding that certification was jurisdictional. For the past nine years, those decisions have created chaos over the effect to be given a failure to comply with the technical certification requirements imposed by the courts or by regulation. These requirements are not imposed by the Act. Instead, for the most part, they have been judicially legislated. These requirements have been a colossal waste of judicial resources and a major frustration of the Contract Disputes Act.

While the court has allowed the recertification and resubmission of defective claims, the result does not eliminate the enormous waste of resources and expense in litigating issues unrelated to the merits of the claims. Moreover, the eighteen-month statute of limitations for the filing of claims on shipbuilding contracts (10 U.S.C. § 2405) has recently been raised as a possible bar to resubmission. If upheld, the result would be that millions of dollars in valid claims could be voided because of ambiguous technicalities.

The Federal Circuit Bar Association and its members have a direct and substantial interest in the is-

sues presented to this Court by Grumman Aerospace Corporation's petition, and in urging this Court to review and reverse the decision of the court below.

REASONS FOR GRANTING THE WRIT

The Court of Claims and Federal Circuit decisions holding that the certification requirement in the Contracts Disputes Act is jurisdictional have spawned hundreds upon hundreds of useless decisions and will continue to waste judicial resources and frustrate the purposes of the Act until those cases are overruled. The Federal Acquisition Regulation applied by the court to limit the contractor representatives qualified to certify for the contractor is contrary to the plain terms and purpose of the Act and is invalid.

I. The Court of Claims' and Federal Circuit's Decisions That Certification of Claims Is Jurisdictional Hinder the Administration of Justice.

No issue arising under the Contract Disputes Act has generated as much litigation as the technicalities of claim certification. As identified in the attached Appendix, the validity of the contractor certification has been litigated in approximately one hundred cases before the Federal Circuit, the Court of Claims, and the Claims Court. The countless decisions of the agency Boards of Contract Appeals far exceed this number but are illustrated by the fact that in the single month of June 1991, the Armed Services Board of Contract Appeals issued nine published decisions addressing the adequacy of claims certification.[1]

---

[1] *Union Boiler Works, Inc.*, ASBCA Nos. 41857, 41858, 41860 (June 27, 1991); *Newport News Shipbuilding and Dry Dock Co.*, ASBCA No. 33244 (June 26, 1991); *Harbert Int'l, Inc.*, ASBCA

These hundreds of cases discuss in detail the technicalities of the precise words necessary for the certification, who can sign the certification, whether a change in the amount of the claim requires a new certification, whether the claim is a contractor claim or a claim by the Government against the contractor for which a certification is unnecessary, and when the certification is required to be submitted.[2] This body of decisional law evinces an enormous but pointless investment of the resources of the courts, the Boards of Contract Appeals and the parties. These decisions contradict the fundamental purpose of the Contract Disputes Act, which is to provide fair and expeditious resolution of government contract disputes.

This waste of resources accomplishes nothing. The only result is to delay the fair consideration of the contractors claim. As the Court of Claims held in *Skelly and Loy v. United States*, 685 F.2d 414, 419 (Ct. Cl. 1982) and as the Federal Circuit repeated in

---

Nos. 41144, 41571 (June 25, 1991); *William L. Crow Constr. Co.*, ASBCA Nos. 40998, 41508 (June 14, 1991); *Lake Shore, Inc.*, ASBCA No. 42578 (June 11, 1991); *JAYCOR*, ASBCA No. 40911 (June 10, 1991); *Allied Painting & Decorating Co.*, ASBCA No. 42496 (June 10, 1991); *Sademi Joint Venture*, ASBCA No. 41025 (June 4, 1991); *Service Engineering Co.*, ASBCA No. 33787 (June 3, 1991).

[2] The Appendix indicates the certification issue presented in each of the listed cases. The Appendix also sets forth the date that the claim at issue was submitted to the Contracting Officer for decision and the date the court or Board issued its decision addressing the validity of the certification. Typically several years elapsed between these dates. In those cases in which the claim was dismissed because the certification was deemed inadequate, all of these years of effort were lost since the contractor is required to begin the process anew with a refiled and recertified claim.

Grumman, 927 F.2d at 581, the "proper course" for a contractor whose claim is dismissed for lack of a valid certification is to "(1) properly certify the claim; (2) resubmit the claim to the contracting officer; and (3) if there is then an adverse contracting officer's decision, appeal either to the board (section 606) or directly to this court (section 609)."

The absurdity and unfairness of this result is apparent in cases such as *United States v. W.H. Moseley Co.*, 730 F.2d 1472 (Fed. Cir. 1984). In *Moseley*, the contractor submitted a claim for over $1,000,000 in 1979. The following year the contracting officer issued her final decision denying the claim and advised the contractor in writing of its right to appeal the decision either under the disputes clause of the contract, or under the Contract Disputes Act. Pursuant to the transition rules then in effect, the contractor elected to proceed to the Court of Claims under the Act. Notwithstanding the contracting officer's instructions to the company, the Government moved to dismiss the appeal on the grounds that the contractor had failed to certify the claim and consequently could not appeal under the Act. The court granted the Government's motion in *W.H. Moseley Co. v. United States*, 677 F.2d 850, *cert. denied*, 459 U.S. 836 (1982). The contractor then certified and refiled its claim, but the contracting officer refused to accept it, arguing that her prior decision was valid. Pursuant to the Act, the contractor obtained an order from the Department of Agriculture Board of Contract Appeals directing the contracting officer to issue a new final decision, but the Government appealed that decision to the Federal Circuit. The Federal Circuit dismissed the appeal as interlocutory, leaving the jurisdictional

issue undecided until after the Board decided the merits. 730 F.2d at 1475-76. Thus, five years after the claim was filed, the contractor was allowed for the first time to present the merits of its case, but with the threat that on appeal, jurisdiction might once again be found lacking. The Federal Circuit imposed this senseless result notwithstanding its regret that "some contractors . . . have become entangled in a procedural maze created by uncertainties regarding the proper application of the Act's provisions." 730 F.2d at 1476.

Even when the contractor prevails, the litigation of certification issues results in substantial delays and expense, and wastes the resources of the courts. For example, in *Placeway Construction Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), the contractor filed a claim in 1986. In 1987, suit was filed in the Claims Court, but the case was dismissed on certification grounds. In 1990, the Federal Circuit reversed the Claims Court's dismissal and remanded the case for proceedings on the merits. After four years and three published decisions, the parties finally turned to the merits of the dispute.

The Claims Court's and Federal Circuit's decisions on certification produce a result that is contrary to the express purpose of the Act. The repercussions of these decisions were well summarized by Chief Judge Smith of the Claims Court as he reluctantly dismissed the contractor's suit in *Clark Mechanical Contractors v. United States*, 12 Cl. Ct. 415 (1987). Judge Smith concluded by stating:

> The plaintiff in this case is not barred by the statute of limitations from refiling, *but is*

> *being required to waste judicial resources as well as its own and the government's resources.* The plaintiff must refile the identical claim with the contracting officer; the only difference being that the claim will now be certified before filing rather than after. Upon receipt of a final decision, the plaintiff can either refile with this court or appeal to the Board of Contract Appeals.

12 Cl. Ct. at 417 (emphasis added).

These decisions are contrary to the fair administration of justice and warrant review by this Court. The petition for writ of certiorari should be granted and the decision of the Federal Circuit reversed.

II. The Jurisdictions of the United States Claims Court and the Boards of Contract Appeals Are Not Dependant Upon the Certification of the Underlying Claim.

The linchpin of the Federal Circuit's decision below was its reaffirmation that the absence of certification of a claim pursuant to Section 6(c)(1) of the Contract Disputes Act deprives a Board of Contract Appeals or the Claims Court of jurisdiction to hear a contract dispute. This holding is erroneous. The Contract Disputes Act of 1978 grants jurisdiction to the Boards and the Claims Court to hear appeals of any final decision of a contracting officer. This grant of jurisdiction is unconditional; certification of the underlying claim is unrelated to the authority of these forums to resolve contract disputes.

The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613,[3] was enacted in order to provide a "fair,

[3] Public Law 95-563, 92 Stat. 2383.

balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims."[4] The Act was based on the recommendations of the Commission on Government Procurement, established pursuant to Pub. Law 91-129. *Senate Report* at 4; *House Report* at 5-6.

The disputes resolution process embodied in the Act is intended, in the first instance, to encourage the parties to resolve controversies through negotiation. Failing that, however, the Act grants the Government's contracting officer the right to unilaterally decide the dispute by issuing a "final decision." Section 6(a) of the Act, 41 U.S.C. § 605(a), provides that all claims by the contractor against the Government, or by the Government against the contractor, shall be the subject of a final decision. That decision is final and conclusive unless appealed by the contractor. 41 U.S.C. § 605(b).

A cornerstone of the Contract Disputes Act was Congress' decision to permit the contractor to appeal any adverse final decision to either the agency's Board of Contract Appeals, or to the United States Court of Claims.[5] To this end, the Act granted, without

---

[4] S. Rep. No. 95-1118, *Contract Disputes Act of 1978*, 95th Cong., 2d Sess., 1 (1978)(hereafter *"Senate Report"*). *See also* H.R. Rep. No. 95-1556, *Contract Disputes Act of 1978*, 95th Cong., 2d. Sess. 5-6 (1978)(hereafter *"House Report"*).

[5] In 1982, the Federal Courts Improvements Act, Pub. Law. 97-164, 96 Stat. 25, was enacted. That statute created the United States Claims Court and transferred the contract jurisdiction of the Court of Claims to that new court. The statute also created the Court of Appeals for the Federal Circuit and provided for the appeal of the decisions of the Claims Court or of the Boards of Contract Appeals to that Circuit.

condition or qualification, jurisdiction to both the Claims Court and Boards of Contract Appeals to decide appeals of final decisions. With respect to the Boards of Contract Appeals, § 7 of the Act, 41 U.S.C. § 606, provides that the contractor may appeal to any agency Board of Contract Appeals within ninety days of receipt of the final decision. Section 8(d) of the Act, 41 U.S.C. § 607(d), grants jurisdiction to the Boards to decide these appeals, stating:

> Each agency Board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Claims Court.

With respect to the Claims Court, § 10(a)(1) of the Act provides that:

> [I]n lieu of appealing the decision of the contracting officer under section 6 to an agency board, a contractor may bring action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

Section 14(i) of the Act amended the Tucker Act, 28 U.S.C. § 1491, to grant the Claims Court jurisdiction to decide any such appeal. The Tucker Act now provides:

> The Claims Court shall have jurisdiction to render judgement upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

28 U.S.C. § 1491(a)(2).

Despite the unequivocal language of these jurisdictional provisions, the Court of Claims held in *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982) that a contractor could not appeal a contracting officer's decision to the court because,"[u]nless [the certification] requirement is met, there simply is no claim that this court may review under the Act." The Court of Appeals for the Federal Circuit has restated in numerous cases, including *Grumman*, that certification is a jurisdictional prerequisite for court review.

The *Lehman* decision and its progeny ignore the recommendations of the Commission on Government Procurement and the system structured by the Commission and by Congress after lengthy hearings and deliberations. These decisions rest on the fallacy that certification "is an important part of the new procedures Congress provided in the Act for the handling of claims by government contractors." *Lehman*, 673 F.2d at 354.

To the contrary, the history of the Contract Disputes Act reflects that claims certification was a minor afterthought based on the testimony of one disgruntled witness. Based on the Commission's recommendations, the Act provided a comprehensive set of procedures and remedies. In separate sections, the Act specifies each of the steps to be followed for

submitting a claim to the Contracting Officer, for appealing directly to court, or for appealing to an agency board of contract appeals and appealing therefrom to court.

The requirement for certification of claims, however, was not among the recommendations of the Commission, was not in the bills as reported by the House and Senate Judiciary Committees, and was not in the bill as originally passed by the House (H.R. 11002). 124 *Cong. Rec.* 31,641-46 (1978). Instead, the certification provision was included as one small part of a package of floor amendments passed by the Senate two days before Congress adjourned. 124 *Cong. Rec.* 36,266 (1978). No mention was made of the certification provision in the explanation provided with the amendments. *Id.* at 36,266-67.[6] The House acceded to the Senate's version of the bill because the short time remaining in the legislative session left no time for a conference. *See* 124 *Cong. Rec.* 37,076 (1978) (remarks of Rep. Kindness). In accepting these amendments, the certification requirement was again ignored. Rather than addressing this supposedly "important" amendment, Congressman Danielson sum-

---

[6] The Court of Claims in *Lehman* mistakenly stated that the sponsor of the amendments, Senator Byrd, explained the amendments to section 6(c) as intended to address the concerns of Admiral Rickover. *Lehman*, 673 F.2d at 354-55. In fact, the passage from Senator Byrd's statement on which the Court relied referred to the deletion of Section 6 as reported by the Judiciary Committee. That section addressed informal administrative conferences (124 *Cong. Rec.* 36,267); section 6 as enacted was based on section of the reported bill. 124 *Cong. Rec.* 36,266. In fact, Senator Byrd in his Explanation of Amendments never referred to the addition of the certification requirement. 124 *Cong. Rec.* 36,266-67.

marized the package of Senate amendments with the single statement: "[T]he Senate amendment to this bill simply reinstates existing law on the burden of proof on an appeal from a contract dispute." *Id.*

This history belies the prominence which the Federal Circuit has accorded certification. Despite the apparent insignificance of this provision to Congress, the court below has elevated claims certification to be the keystone of the disputes process. The court's treatment of certification as a jurisdictional prerequisite is a flagrant example of judicial legislation.

The Federal Circuit's holding that claims certification is jurisdictional is akin to the decision reversed by this Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In *Zipes*, the Seventh Circuit held that the timely filing of a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") was a jurisdictional prerequisite to a suit in federal court under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-5(g). This Court reversed, holding that filing with the EEOC is not jurisdictional, but is "a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393. In reaching this conclusion, this Court explained:

> The provision granting district courts jurisdiction . . . does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate

> provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

455 U.S. at 394 (footnotes omitted).

Likewise here, the provisions of the Contract Disputes Act granting jurisdiction to the Boards of Contract Appeals and Claims Court to decide appeals of contracting officers' final decisions—41 U.S.C. § 607(d) and 28 U.S.C. § 1491(a)(2) respectively—do not limit jurisdiction to those cases in which there has been a proper certification of the claim, or contain any reference to the certification requirement. Like the timely filing provisions in Title VII, the certification requirement appears as an entirely separate provision that neither speaks in jurisdictional terms, nor refers in any way to the jurisdiction of the Claims Court or the Boards. Section 6(c)(1) of the Contracts Disputes Act, 41 U.S.C. § 605(c)(1), simply provides:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

The sole jurisdictional predicate for an appeal under the Contract Disputes Act is a final decision of a contracting officer. Here, Grumman's claim was denied by the Department of the Navy's Corporate Administrative Contracting Officer on March 4, 1987. *Grumman*, 927 F.2d at 577. Grumman appealed that decision to the Armed Services Board of Contract Appeals on April 1, 1987—well within the ninety day

period for appeal specified in § 7 of the Act, 41 U.S.C. § 606. Nothing more was necessary to establish the jurisdiction of the Board to decide the dispute, and it decided in favor of Grumman. The Federal Circuit erred in dismissing Grumman's claim for lack of jurisdiction. This Court should accept certiorari and should reverse that court's decision.

III. FAR 33.207(c)(2) Is Invalid Because It Conflicts with the Plain Language and Express Purpose of the Statute It Purports To Interpret.

Section 6(c)(1) of the Contract Disputes Act provides that "the contractor shall certify" the claim. Section 2(4) of the Act defines "contractor" simply as "a party to a Government contract other than the Government." The Act properly leaves to the contractor the choice of who can execute the certification, the only question being whether the person is authorized to act on behalf of the contractor. Under the plain terms of the statute, any contractor representative authorized to bind the contractor can certify.

Despite the seemingly unambiguous language of the statute, FAR 33.207(c)(2) purports to limit the range of persons authorized to execute certifications to:

> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

This regulatory requirement is more than a technicality. Given the Federal Circuit's decisions that a proper certification is jurisdictional, upholding this regulation cedes to the administrative agencies the

power to restrict the jurisdiction of the courts, and to limit the rights of contractors to appeal adverse final decisions that was granted to them by Congress. The only limitations on this agency power would be that the limitations be "reasonable." Certainly, no administrative agency can limit the appealability of its own decisions in the face of a statutory right of appeal, yet that is the effect of FAR 33.207(c)(2). On its face, the regulation conflicts with the Contract Disputes Act and should be disregarded.

Moreover, this regulation is so ambiguous that even experts in government procurement law are unable to advise their clients who the proper person is to sign, or provide assurance that any particular certification will withstand a challenge by the Government. The dozens of published decisions addressing who can sign a certification attest to the difficulties of applying the regulatory language in practice.

The *Grumman* majority justified the regulation as a "permissible act of administrative gap-filling." 927 F.2d at 578. As the dissent makes clear, however, such gap-filling is permissible only when a statute is ambiguous or silent on a particular point, and then only when the Executive branch gap-filling accords with legislative history. *Grumman*, 927 F.2d at 582. A Congressional purpose underlying the comprehensive disputes resolution system enacted with the Contract Disputes Act was to eliminate Executive branch manipulation of the disputes resolution process. Senate Report at 2. FAR 33.207(c)(2) conflicts with this purpose.

FAR 33.207(c)(2) conflicts with the plain language of the very statute it purports to implement. When confronted with an attempt to modify the plain mean-

ing of a statute through the use of a single example from its legislative history, Chief Judge Marvin Jones of the former United States Court of Claims appropriately stated: "[a]n explanatory tale should not wag a statutory dog." *A. P. Green Export Company v. United States*, 284 F.2d 383, 386 (Ct. Cl. 1960). This colorful language aptly characterizes the narrow limitation in FAR 33.207(c)(2) of the otherwise unambiguous term "contractor."

IV. A Decision Overruling Lehman Could Be Limited To Prospective Application.

A decision overruling the *Grumman* and *Lehman* decisions could be limited to prospective application so as to avoid disturbing decided cases. This Court and the Courts of Appeal have often declined to retroactively apply decisions that overrule clear past precedent. *See Solem v. Stumes*, 465 U.S. 638, 646-47 (1984) (an announcement of a new standard "is almost automatically nonretroactive" where the decision "has explicitly overruled past precedent"). For example, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982), this Court held that the broad grant of jurisdiction to the bankruptcy courts in 28 U.S.C § 1471 was unconstitutional, but declined to make that ruling retroactive in part because "retroactive application . . . would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *See also id.* at 92 (Rehnquist, J., concurring).

Similarly, in *Allen v. Hardy*, 478 U.S. 255, 260 (1986) (per curiam), this Court declined to apply *Batson v. Kentucky*, 476 U.S. 79 (1986) retroactively to proceedings that were final when *Batson* was an-

nounced. It found that retroactive application "would seriously disrupt the administration of justice," because of the need to hold hearings after the prior proceedings had become final in order to determine if they had been held in accordance with the rule established for the first time in *Batson*. *Cf. Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976) (actions of FEC prior to Court decision accorded *de facto* validity, despite holding that method of FEC selection was unconstitutional); *Boeing Co. v. United States*, 680 F.2d 132, 141 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1081 (1983). Similarly, this Court can determine that certification of claims is not jurisdictional without disturbing cases previously decided.

CONCLUSION

For the reasons set forth in the dissent in *Grumman*, 927 F.2d at 581-84, and all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

OF COUNSEL:

CYRUS E. PHILLIPS, IV
MCGUIRE, WOODS, BATTLE & BOOTHE
Suite 1000
1627 Eye Street, N.W.
Washington, D.C. 20006

CLARENCE T. KIPPS, JR.
(Counsel of Record)
MILLER & CHEVALIER, CHARTERED
Metropolitan Square
Suite 900
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Amicus Curiae,
The Federal Circuit Bar Association

July 29, 1991

APPENDIX

APPENDIX

Decisions of the Court of Appeals for the Federal Circuit, Court of Claims and Claims Court on Certification of Claims

Case Name	Claim Date	Decision Date	Issue
Decisions in Which Claim Was Dismissed for Lack of Proper Certification			
W.M. Schlosser Co., Inc. v. United States, 705 F.2d 1136 (Fed. Cir. 1983)	02/80	04/22/83	No certification.
Thoen v. United States, 5 Cl. Ct. 823 (1984), *vacated*, 765 F.2d 1110 (Fed. Cir. 1985)	06/23/83	06/25/85	No certification.
Sante Fe Eng'rs, Inc. v. United States, 818 F.2d 856 (Fed. Cir. 1987)	03/11/81	05/13/87	Change in nature of claim.
Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426 (Fed. Cir. 1989)	11/30/84	07/07/89	Who can sign certification?

Case Name	Claim Date	Decision Date	Issue
Placeway Constr. Corp. v. United States, 18 Cl. Ct. 159 (1989), *aff'd in part and vacated in part*, 910 F.2d 835, *reh'g granted in part*, 920 F.2d 903 (Fed. Cir. 1990)	05/28/86	11/14/90	Change in amount of claim.
United States v. Grumman Aerospace Corp., 918 F.2d 185, 927 F.2d 575 (Fed. Cir. 1991)	01/07/87	02/27/91	Who can sign certification?
Paul E. Lehman, Inc. v. United States, 673 F.2d 352 (Ct. Cl. 1982)	12/79	02/24/82	No certification.
W.H. Moseley Co. v. United States, 677 F.2d 850 (Ct. Cl. 1982), 730 F.2d 1472 (Fed. Cir. 1984)	06/15/79	03/26/84	Form of certification.
Tri-Central, Inc. v. United States, 230 Ct. Cl. 842 (1982)	01/80 est.	03/23/82	No certification.

Case Name	Claim Date	Decision Date	Issue
Arlington Alliance, Ltd. v. United States, 685 F.2d 1353 (Ct. Cl. 1982)	09/21/81	08/11/82	No certification.
Skelly and Loy v. United States, 685 F.2d 414 (Ct. Cl. 1982)	12/11/80	08/11/82	Form of certification.
Troup Bros. Inc. v. United States, 231 Ct. Cl. 370 (1982)	1980 est.	06/08/82	Timing of certification.
Grad Partnership v. United States, 1 Cl. Ct. 616 (1982)	04/06/81	11/22/82	No certification.
Fidelity and Deposit Co. of Md. v. United States, 2 Cl. Ct. 137 (1983)	09/18/80	03/23/83	No certification.
A.B.M. Precision Metal Works, Inc., v. United States, 2 Cl. Ct. 332 (1983)	07/82	04/26/83	No certification.
Warchol Constr. Co., Inc. v. United States, 2 Cl. Ct. 384 (1983)	09/25/80	04/21/83	No certification.

Case Name	Claim Date	Decision Date	Issue
Conoc Constr. Corp. v. United States, 3 Cl. Ct. 146 (1983)	01/05/82	07/29/83	No certification.
Walsky Constr. Co. v. United States, 3 Cl. Ct. 615 (1983)	09/28/81	10/20/83	No certification.
Alchemy, Inc. v. United States, 3 Cl. Ct. 727 (1983)	02/17/83	11/16/83	Timing of certification.
Palmer & Sicard, Inc. v. United States, 4 Cl. Ct. 420 (1984)	03/27/81	02/06/84	Form of certification.
Black Star Sec., Inc. v. United States, 5 Cl. Ct. 110 (1984)	11/18/81	04/06/84	No certification.
Parking Co. of America v. United States, 5 Cl. Ct. 139 (1984)	05/12/82	05/08/84	No certification.
Cosmic Constr. Co. v. United States, 5 Cl. Ct. 237 (1984)	11/03/81	05/21/84	No certification.
T.J.D. Servs., Inc. v. United States, 6 Cl. Ct. 257 (1984)	08/05/81	09/11/84	Form of certification.

Case Name	Claim Date	Decision Date	Issue
Pinkston v. United States, 6 Cl. Ct. 263 (1984)	07/29/83	09/14/84	No certification.
Halec Constr. Co., Inc. v. United States, 6 Cl. Ct. 439 (1984)		10/19/84	Change in amount of claim.
LDG Timber Enterprises, Inc. v. United States, 8 Cl. Ct. 445 (1985)	01/26/81	07/03/85	Change in amount of claim.
Gunn-Williams v. United States, 6 Cl. Ct. 820 (1984), 8 Cl. Ct. 531 (1985)	11/04/83	07/17/85	No certification.
Beacon Oil Co. v. United States, 8 Cl. Ct. 695 (1985)	03/30/82	09/18/85	No certification.
Prefab Prods., Inc. v. United States, 9 Cl. Ct. 786 (1986)	12/17/85	05/09/86	Timing of certification.
Fredenburg v. United States, 10 Cl. Ct. 216 (1986)	03/01/85	07/14/86	Form of certification.
Universal Sur. Co. v. United States, 10 Cl. Ct. 794 (1986)	03/23/84	09/18/86	No certification.

Case Name	Claim Date	Decision Date	Issue
Aeronetics Div., AAR Brooks & Perkins Corp. v. United States, 12 Cl. Ct. 132 (1987)	05/30/85	04/09/87	Form of certification.
H.H.O. Company v. United States, 12 Cl. Ct. 147 (1987)	05/09/85	04/09/87	No certification.
Romala Corp. v. United States, 12 Cl. Ct. 411 (1987)	04/10/86	06/03/87	Who can sign certification?
Clark Mechanical Contractors v. United States, 12 Cl. Ct. 415 (1987)	07/16/86	05/13/87	Timing of certification.
Donald M. Drake Co., v. United States, 12 Cl. Ct. 518 (1987)	10/06/83	06/30/87	Who can sign certification?
Citizens Assocs., Ltd. v. United States, 12 Cl. Ct. 599 (1987)	10/16/86	07/10/87	No certification.
Technassociates, Inc. v. United States, 14 Cl. Ct. 200 (1988)	03/25/85	01/27/88	Form of certification.
Gardner Mach. Corp. v. United States, 14 Cl. Ct. 286 (1988)	12/21/83	02/09/88	Form of certification.

Case Name	Claim Date	Decision Date	Issue
Frawley v. United States, 14 Cl. Ct. 766 (1988)	06/11/87	05/31/88	No certification.
Claude E. Atkins Enterprises, Inc. v. United States, 15 Cl. Ct. 644 (1988)	12/18/86	10/28/88	Timing of certification.
Al-Kurdi v. United States, 16 Cl. Ct. 660 (1989)	12/10/87	04/26/89	No certification.
Cecile Indus., Inc. v. United States, 18 Cl. Ct. 730 (1989)	04/23/84	11/22/89	No certification.
Spirit Leveling Contractors v. United States, 19 Cl. Ct. 84 (1989)	12/14/84	12/15/89	Change in nature of claim.
New Chardon Street Ltd. Partnership v. United States, 19 Cl. Ct. 208 (1990)	05/03/89	01/08/90	Form of certification.
Clean Giant, Inc. v. United States, 19 Cl. Ct. 390 (1990)	12/21/87	02/07/90	No certification.
SMS Data Prods. Group, Inc. v. United States, 17 Cl. Ct. 1 (1989)	04/20/87	03/01/90	Change in amount of claim.

Case Name	Claim Date	Decision Date	Issue
Al Johnson Constr. Co. v. United States, 19 Cl. Ct. 732 (1990)	09/02/86	02/21/90	Who can sign certification?
SGW, Inc. v. United States, 20 Cl. Ct. 174 (1990)	01/22/88	04/19/90	No certification.
National Sur. Corp. v. United States, 20 Cl. Ct. 407 (1990)	07/31/86	05/15/90	Who can sign certification?
American Nat. Bank & Trust Co. of Chicago v. United States, 20 Cl. Ct. 530 (1990)	02/24/89	05/30/90	Form of certification.
Westech Corp. v. United States, 20 Cl. Ct. 745 (1990)	06/22/84	07/02/90	Who can sign certification?
Lakeview Constr. Co. v. United States, 21 Cl. Ct. 269 (1990)	07/17/87	08/23/90	No certification.
Century Constr. Co. v. United States, 22 Cl. Ct. 63 (1990)	04/30/86	11/20/90	Form of certification.
Robin Industries, Inc. v. United States, 22 Cl. Ct. 448 (1991)	01/26/89	01/28/91	Form of certification.

Case Name	Claim Date	Decision Date	Issue
AAI Corp. v. United States, 22 Cl. Ct. 541 (1991)	12/18/87	02/22/91	Change in nature of claim.
KDH Corp. v. United States, 23 Cl. Ct. 34 (1991)	03/25/86	04/30/91	Form of certification.
Reliance Ins. Co. v. United States, 23 Cl. Ct. 108 (1991)	04/08/86	05/08/91	Who can sign certification?
Cupey Bajo Nursing Home, Inc. v. United States, 1991 United States Cl. Ct. Lexis 256	06/08/87	06/19/91	Form of certification.
Decisions in Which Interest Was Forfeited for Lack of Proper Certification			
Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983)	10/26/79	02/18/83	No certification.
Essex Electro Engineers, Inc. v. United States, 702 F.2d 998 (Fed. Cir. 1983)	02/22/80	03/11/83	No certification.

Case Name	Claim Date	Decision Date	Issue
ReCon Paving, Inc. v. United States, 745 F.2d 34 (Fed. Cir. 1984)	06/24/82	10/03/84	Form of certification.
J.M.T. Mach. Co., Inc. v. United States, 826 F.2d 1042 (Fed. Cir. 1987)	02/20/84	04/30/87	Untimely certification.
Black Leaf Prods. Co. v. United States, 4 Cl. Ct. 307 (1984)	11/19/79	01/09/84	No certification.
Hoffman Constr. Co. v. United States, 7 Cl. Ct. 518 (1985)	02/09/83	03/13/85	No certification.
Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988)	07/06/83	08/28/87	Form of certification.
Timberland Paving and Constr. Co. v. United States, 18 Cl. Ct. 129 (1989)	12/17/79	08/31/89	No certification.

Case Name	Claim Date	Decision Date	Issue
Decisions in Which Contractor Prevailed on Government Challenge to Certification			
United States v. General Elec. Corp., 727 F.2d 1567 (Fed. Cir. 1984)	11/13/79	02/28/84	Form of certification.
Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984)	12/09/80	04/24/84	Change in amount of claim.
Cedar Lumber, Inc. v. United States, 799 F.2d 743 (Fed. Cir. 1986)	02/09/84	08/20/86	No certification.
Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987)	10/15/76	02/12/87	Change in amount of claim.
Institut Pasteur v. United States, 10 Cl. Ct. 304 (1986), *rev'd*, 814 F.2d 624 (Fed. Cir. 1987)	10/04/84	07/07/86	No certification.

Case Name	Claim Date	Decision Date	Issue
United States v. Turner Constr. Co., 827 F.2d 1554 (Fed. Cir. 1987)	05/19/80	09/03/87	Certification of subcontractor's claim.
Glenn v. United States, 13 Cl. Ct. 784 (1987), vacated, 858 F.2d 1577 (Fed. Cir. 1988)	06/08/87	10/13/88	Change in amount of claim.
Dawco Constr., Inc. v. United States, 18 Cl. Ct. 682 (1989), *aff'd in part and rev'd in part*, 930 F.2d 872 (Fed. Cir. 1991)	05/21/84	04/03/91	No certification.
United States v. Newport News Shipbuilding and Dry Dock Co., 933 F.2d 996 (Fed. Cir. 1991)	02/09/84	5/20/91	Who can sign certification?
Folk Constr. Co., Inc., 226 Ct. Cl. 602 (1981)	07/31/78	01/16/91	No certification.
Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981)	09/03/79	04/08/81	Form of claim.

Case Name	Claim Date	Decision Date	Issue
Brookfield Constr. Co., Inc. v. United States, 661 F.2d 159 (Ct. Cl. 1981)	06/29/79	09/23/81	No certification.
Metric Constr. Co., Inc. v. United States, 1 Cl. Ct. 383 (1983)	04/07/81	02/08/83	Form of certification.
Klochko Equip. Rental Co., Inc. v. United States, 2 Cl. Ct. 733 (1983)	06/11/80	07/06/83	No certification.
J. F. Shea Co., Inc. v. United States, 4 Cl. Ct. 46 (1983)	06/23/80	11/30/83	Change in amount of claim.
Curley, Inc. v. United States, 6 Cl. Ct. 274 (1984)	02/18/82	09/25/84	Change in amount of claim.
Transamerica Ins. Co. v. United States, 6 Cl. Ct. 367 (1984)		10/03/84	Who can sign certification?
Gregory Lumber Co. v. United States, 9 Cl. Ct. 503, 11 Cl. Ct. 489 (1986)	08/80 - 03/11/81	01/31/86	No certification.
Elgin Builders, Inc. v. United States, 10 Cl. Ct. 40 (1986)	1979-1980 est.	05/20/86	No certification.

Case Name	Claim Date	Decision Date	Issue
Todd Bldg. Co. v. United States, 13 Cl. Ct. 587 (1987)	11/21/85	11/13/87	Form of certification.
El Centro v. United States, 17 Cl. Ct. 794 (1989)	02/85	08/07/89	No certification.
Embrey v. United States, 17 Cl. Ct. 617 (1989)	07/22/87	07/17/89	Change in amount of claim.
Triax Co. v. United States, 17 Cl. Ct. 653 (1989), *vacated*, 20 Cl. Ct. 507 (1990)	04/01/85	05/25/90	Who can sign certification?
Cubic Corp. v. United States, 20 Cl. Ct. 610 (1990)	03/28/86	06/06/90	Form of certification.
Western Empire Constructors, Inc. v. United States, 20 Cl. Ct. 668 (1990)	10/05/83	06/13/90	Who can sign certification?
Sun Cal, Inc. v. United States, 21 Cl. Ct. 31 (1990)	03/01/85	07/10/90	Who can sign certification?
Cox Constr. Co. v. United States, 21 Cl. Ct. 98 (1990)	01/21/88	08/07/90	Who can sign certification?

Case Name	Claim Date	Decision Date	Issue
Little River Lumber Co. v. United States, 21 Cl. Ct. 527 (1990)	04/14/78	09/28/90	Who can sign certification?
Manning Elec. & Repair Co., Inc. v. United States, 22 Cl. Ct. 240 (1991)	07/28/88	01/03/91	Who can sign certification?

(8)

No. 90-1800

Supreme Court, U.S.
FILED
AUG 13 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

REPLY OF GRUMMAN AEROSPACE CORPORATION TO BRIEF IN OPPOSITION

Of Counsel:

MICHAEL D. POLANSKY
General Counsel
GRUMMAN AEROSPACE CORPORATION
Bethpage, New York 11714

GENE PERRY BOND
(Counsel of Record)
ROBERT L. DEITZ
LYNDA TROUTMAN O'SULLIVAN
MARTIN P. WILLARD
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005
202/628-6600

Attorneys for Petitioner Grumman Aerospace Corporation

August 13, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1800

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

REPLY OF GRUMMAN AEROSPACE CORPORATION TO BRIEF IN OPPOSITION

Petitioner Grumman Aerospace Corporation respectfully files this Reply to the United States' Brief in Opposition.

I. No Deference Is Due to OFPP Under *Chevron*.

The Government does not contest the fact that the Office of Federal Procurement Policy (OFPP) does not administer the Contract Disputes Act. Indeed, the Government's argument that OFPP had statutory authority to issue the claim certification regulation at issue in this case relies primarily on a different stat-

ute, the OFPP Act, 41 U.S.C. §§ 401-20. The Government concedes that the Contract Disputes Act expressly grants OFPP only limited authority to issue guidelines—not binding regulations—in the circumscribed area of agency board establishment, functions, and procedures. Opp. 8-9.

The OFPP Act, of course, authorizes only promulgation of *procurement* regulations, not regulations affecting *contract disputes*. So it is doubtful whether the OFPP Act could provide any authority to promulgate the contract disputes certification regulation. Furthermore, if the primary support for OFPP's certification regulation is to be found not in the Contract Disputes Act, but in the OFPP Act, then the Government's *jurisdictional* argument must fail. The panel below based its holding that the certification regulation has jurisdictional effect on the assumption that OFPP's authority derives from the Contract Disputes Act. But if OFPP's authority in fact derives from the OFPP Act, not the Contract Disputes Act, then the panel erred, and the regulation cannot have the jurisdictional effect the Government claims.

Finally, the Government's position begs the central question posed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The question *Chevron* poses—indeed, the threshold question whenever deference to agency interpretation of a statute is at issue—is whether Congress left any gap to fill. Here the words of Congress are plain and unambiguous ("the contractor shall certify . . . .").[1] Moreover, neither *Chevron* nor any of its progeny

[1] Ironically, it is the regulation, not the statute, that is ambiguous.

holds that an agency's interpretation of statutes it does not administer should be accorded deference. The Contract Disputes Act plainly does not grant OFPP authority to administer the Act. Thus, deference under *Chevron* simply does not apply in this case. *See Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring).

II. The Government Wrongly Asserts that the Jurisdictional Issue Has No Practical Consequence.

The Government (Opp. 10-11) mistakenly asserts that the panel's treatment of certification as a jurisdictional prerequisite does not alter the practical consequence for Petitioner. This is not the case. As Grumman has pointed out (Pet. 26-27), the Government's answer before the Armed Services Board of Contract Appeals admitted without qualification the jurisdiction of the Board under the Contract Disputes Act.[2] Unless proper certification is jurisdictional, submission of an improper certificate is a defect that can be waived or cured. The principles of waiver and cure obviate any need for Petitioner to begin anew by resubmitting its certified claim to the contracting officer.

An equally significant consequence of the panel's erroneous treatment of the certification requirement is the loss of five years' interest on Petitioner's claim. Pet. 11, n. 4. Finally, contrary to the Government's implicit assertion (Opp. 10 n. 8), statutes of limitation generally are not tolled by the filing of a complaint

---

[2] Moreover, as noted in Grumman's Petition (Pet. 27 n. 10), the Government never moved the Board to dismiss for lack of jurisdiction.

where the court lacks jurisdiction over the subject matter.[3]

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Of Counsel:

MICHAEL D. POLANSKY
General Counsel
GRUMMAN AEROSPACE CORPORATION
Bethpage, New York 11714

GENE PERRY BOND
(Counsel of Record)
ROBERT L. DEITZ
LYNDA TROUTMAN O'SULLIVAN
MARTIN P. WILLARD
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005
202/628-6600

Attorneys for Petitioner Grumman Aerospace Corporation

August 13, 1991

---

[3] The Government cites *Travelers Indemnity Co. v. United States*, 16 Cl. Ct. 142 (1988), for the proposition that the six-year limitations period contained in 28 U.S.C. § 2501 does not apply once the contractor elects to proceed under the Contract Disputes Act. The Government will undoubtedly contend, however, that a contractor that has filed a defective certification has *not* elected to proceed under the Act. Moreover, 10 U.S.C. § 2405(a) requires contractors to submit contract claims arising under shipbuilding contracts within eighteen months of accrual. The Government has interpreted this provision to require the submission of a "properly certified" claim in order to toll the limitations period. *See* Shipbuilders Council of America Brief *Amicus Curiae* In Support of Petitioner, 3.